Supreme Court, U.S.
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No. 95-1136

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

GREGORY MURRAY,
Petitioner,

v.

DETROIT RIVERVIEW HOSPITAL, DETROIT-MACOMB HOSPITAL CORP., DETROIT RIVERVIEW HOSPITAL WORKERS LOCAL 2435, AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES (AFL-CIO), a labor organization, and MICHIGAN AFSCME COUNCIL 25 (AFL-CIO), a labor organization,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED *

I.

WHAT STANDARD SHOULD DEFINE THE RATIONALITY OF THE UNION'S ACTIONS FOR THE PURPOSE OF DECIDING WHETHER ITS HANDLING OF A DISCHARGE GRIEVANCE WAS "ARBITRARY," IN VIOLATION OF ITS DUTY OF FAIR REPRESENTATION?

II.

DOES A UNION BREACH ITS DUTY OF FAIR REPRESENTATION BECAUSE ITS KNOWING FAILURE TO DO A MINISTERIAL ACT THAT, BY OBJECTIVE STANDARDS, IT SHOULD HAVE KNOWN IT WAS REQUIRED TO DO AND THAT AVAILABLE EVIDENCE INDICATED IT *DID* KNOW THAT IT WAS REQUIRED TO DO CAUSED AN EMPLOYEE'S RIGHT TO A HEARING ON THE MERITS OF HIS DISCHARGE CASE TO BE EXTINGUISHED?

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* All parties to the proceeding in the court below are listed in the caption.

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OPINIONS BELOW

The lower courts' decisions in this case are not reported, officially or unofficially. The district court's decision appears at App. 10a-12a; the decision on appeal appears at App. 1a-7a.

JURISDICTION

The court of appeals decision was filed on August 29, 1995. App. 1a. On September 14, 1995, petitioner filed his petition for rehearing and suggestion of rehearing *en*

banc. His petition for rehearing was denied by order filed October 17, 1995. App. 13a. This Court's jurisdiction arises under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Section 301(a) of the Labor-Management Relations Act, 29 U.S.C. § 185(a), provides:

> "Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties."

Section 9(a) of the National Labor Relations Act, 29 U.S.C. § 159(a), provides in relevant part:

> "Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment. . . ."

STATEMENT OF THE CASE

Petitioner's claims were for wrongful discharge and breach of the union's duty of fair representation ("DFR") in handling his grievance and unfair labor practice charges arising from his discharge from employment and the discharge of two other union stewards one month before his own discharge.

A. Facts

Petitioner Gregory Murray had five years seniority when he was discharged by the respondent employer, the Detroit Riverview Hospital and the Detroit-Macomb Hospital Corporation (referred to herein collectively as "the employer")[1] on a false accusation that he left his assigned area at the end of his shift without a relief employee present.[2] One of the other two discharged stewards had 18 years seniority. The circumstances suggested that the stated bases for the discharges were pretexts to remove activist stewards.

The respondent unions, Detroit Riverview Hospital Workers Local 2435, AFSCME (AFL-CIO), and Michigan AFSCME Council 25 (AFL-CIO) (referred to herein collectively as "the union"),[3] treated the discharge grievance as meritorious, and it demanded arbitration, but it failed to provide the arbitrator a contractually required notice of expedited arbitration, prompting the employer to refuse to arbitrate the grievance on timeliness grounds.

The collective bargaining agreement ("CBA") required expedited arbitration of all discharge cases pursuant to a provision negotiated for the first time in that agreement.

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[1] Petitioner's place of employment was the Detroit Riverview Hospital, which was owned and controlled by the Detroit-Macomb Hospital Corporation.

[2] Murray testified by affidavit that when he clocked out at 7:30 a.m., another admitting clerk was still on duty and was required to remain on duty until relieved. He was required by the employer's policies to leave when he did, at the expiration of his shift, because no overtime had been authorized for him and there was no emergency that would have warranted unauthorized overtime. After he clocked out, the remaining admitting clerk left the area, without relief. The issues were presented by summary judgment motions, and the court was required to credit Murray's uncontroverted account of his discharge.

[3] Both labor organizations were parties to the collective bargaining agreement, and they shared grievance processing responsibilities.

When petitioner was discharged, the CBA was three years old and the union had already processed at least seven discharge cases under its expedited arbitration procedure. Nevertheless, the union failed to modify its grievance processing procedures to provide notice to the arbitrator in expedited cases. In all of the cases that preceded the stewards' discharges, the employer protested the arbitration demands as untimely because the union failed to notify the arbitrator, and the union voluntarily withdrew every case from arbitration.

After the employer's objection to arbitration of the three stewards' cases, the union filed unfair labor practice ("ULP") charges challenging the discharges as anti-union discrimination and the employer's refusal to arbitrate arbitrability. However, the union filed the charges in the wrong forum (the Michigan Employment Relations Commission, instead of the National Labor Relations Board). By the time petitioner learned that the ULP charges had been filed in the wrong forum, the section 10(b) period, 29 U.S.C. § 160(b), had expired.

The union ultimately persuaded the employer to arbitrate the issue of arbitrability before three separate arbitrators. The union claimed in arbitration that its failure to provide timely notice to the arbitrators was deliberate: It reasoned that it was simply following its established procedure for the processing of grievances, and that the procedure for expedited arbitration was ambiguous because it failed to explicitly instruct that *the party demanding arbitration* was the party required to notify the arbitrator.[4] The union also claimed that the "newness" of the

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[4] The procedure provided in relevant part:

> *Step 5.* If the grievance is not resolved at Step 4, either party may give notice to the other party of its intent to arbitrate such grievance. Such notice shall be given within fourteen (14) calendar days (including Saturdays, Sundays and holidays) of the receipt of the Hospital's Step 4 answer. Arbitration demands shall be filed in one of the following ways:

provision for expedited arbitration of discharge cases, which included the notice requirement, should excuse its failure to modify its grievance processing procedures, and that it needed the extra time to investigate discharge cases fully.

All three arbitrators ruled that it was the union's duty to provide the contractual notice of arbitration. Each arbitrator rejected the union's alleged "contract interpretation." [5] Arbitrator Daniel wrote:

> "The arbitrator cannot conceive any reason why the union, in these many cases over a period of two

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> (1) Grievances involving layoff, recall from layoff, discharge or disciplinary suspension shall be processed through an expedited procedure. These grievances shall be heard by an arbitrator drawn from a preselected list of five (5) mutually agreed upon names. . . .
>
> (a) *Upon filing of a demand for arbitration, it shall be submitted to an arbitrator* selected on a rotation basis from the jointly agreed upon list. The arbitrator shall schedule and hold a hearing within ninety (90) calendar days from the date the arbitrator was notified of the assignment, and the arbitrator shall submit a decision within thirty (30) calendar days following the hearing. If post-hearing briefs are filed, they must be filed within seven (7) calendar days following the hearing, but the filing of briefs will not extend the time for the arbitrator's decision.
>
> * * * *
>
> (2) Grievances not involving layoff, recall from layoff, discharge or disciplinary suspension may be taken to arbitration as follows:
>
> (a) The parties shall promptly endeavor to agree in the selection of an arbitrator. If they have not so agreed within seven (7) days after the submission to arbitration, the Union shall, within the next seven (7) days request the American Arbitration Association to cause the selection of an arbitrator to be made . . . .

[5] Arbitrators Frost, in petitioner's case, and Glendon ruled that the union's failure was a jurisdictional defect. Arbitrator Daniel ruled that the failure was a nonjurisdictional defect that deprived the grievant of back pay for the period of the union's delay.

> years, would not have notified the arbitrator directly and, hence have avoided all trouble that resulted. It seems almost to be a stubborn obstinance and insistance on some inconsequential principal. It might also be that the union simply was in a position where it could not evaluate cases in the fashion it wished and often was forced to file for arbitration when it had not quite decided whether to arbitrate. Whatever the reason, it is obvious the union could have avoided the problem in each of these cases by notifying the arbitrator after having filed the demand for arbitration."

In denying Baker's grievance, Arbitrator Glendon commented:

> "And it must be noted that the Union has it in its power to avoid such disputes by the simple method of simultaneous notice to the Employer and the arbitrator when the arbitration demand is filed, which, as noted in the Employer's post-hearing brief, would involve no great expense or hardship and still would leave time for further review of the grievance prior to the actual hearing."

Arbitrator Frost, in the petitioner's case, expressly adopted the conclusion of Arbitrator Glendon that the union's position "[o]bviously . . . makes no sense." Arbitrator Frost noted that the union's position was "inconsistent with the well-established contractual intent to expedite final resolution of discharge grievances," and that "it is illogical to assume any obligation other than on the moving party for perfecting that appeal."

The arbitrators characterized the union's conduct as indefensible. Arbitrator Daniel wrote:

> "This was not a new dispute for the union and the employer. It had arisen on numerous occasions in 1989 and 1990 and the employer had consistently declined to arbitrate any case where the union did not initiate the contact with the arbitrator at the

> same time that it filed. The record reveals that routinely over the years, these cases were withdrawn or processed no further by the Union. In January 1990, the employer declined seven cases on the basis of their untimely filing and this was in addition to numerous letters previously sent by the employer to the union insisting that there was a failure in many cases to follow the procedure."

As a direct result of the union's acts and omissions, petitioner was deprived of hearings on the merits of his grievance, which the union considered to be meritorious, as well as his ULP claim.

B. Proceedings Below

After exhausting his internal union remedies, petitioner filed suit in state court on August 11, 1993. On September 2, 1993, the defendants removed the action to the United States District Court for the Eastern District of Michigan under 28 U.S.C. § 1441(b), as an action arising under 29 U.S.C. § 185. The steward with 18 years seniority when she was discharged, Darlene Baker, filed suit, completed discovery and lost her case in summary judgment proceedings just as discovery was getting underway in the instant lawsuit. *Baker v. Detroit Riverview Hospital et al.*, 834 F. Supp. 216 (E.D. Mich. 1993), *aff'd.*, Docket No. 04-2426 (6th Cir. 1995). The parties in the instant case stipulated to stay discovery pending the filing and disposition of cross summary judgment motions limited to the duty of fair representation issues.

While preparing his summary judgment motion, petitioner obtained documents from Baker's counsel that revealed the union had learned of its negligent misfiling of the ULP case in the wrong forum when the employer answered the ULP charge with an affirmative defense objecting to the state commission's subject matter jurisdiction—*i.e.*, while there was still time to refile petitioner's case before the NLRB within the 10(b) period. How-

ever, presumably because it was already too late to salvage Baker's case, the union had willfully concealed its mistake from all of the grievants until after the section 10(b) period expired on all three cases. On the basis of this newly acquired evidence, one month after discovering the claim and before the parties' stipulated stay of discovery expired, petitioner moved to amend his pleadings to add a willful concealment claim.

On February 1, 1994, the district court entered orders granting respondents' motions for summary judgment and denying petitioner's cross motion for summary judgment and his motion to amend the complaint. App. 8a. The district court disregarded the evidence that the union had known it was required to notify the arbitrator of its demand for expedited arbitration, but had stubbornly refused to modify its grievance processing procedures to accomodate that duty: the employer's "consistent and firm" timeliness objections (the employer's characterization) in every prior discharge case; the union's voluntary withdrawal of all of its discharge cases from arbitration upon the employer's timeliness objection, until confronted by three discharged stewards, who understood their contract rights; and, perhaps most telling, the union's failure to file an interpretation grievance, a device that could have resolved the alleged interpretation dispute without sacrificing *any* meritorious discharge cases. The district court reasoned that the union's "contract interpretation" was—as a matter of law—"simply . . . an error of judgment or a business error, a misinterpretation of the manner in which a new contract should be administered, ..." App. 11a.

The court of appeals affirmed, refusing to concede even that the union's "contract interpretation" was a mistake. Rather, the appeals court affirmed on the ground that the union's alleged "contract interpretation" was—as a matter of law, contrary to the opinions of three arbitrators—"one sensible construction." App. 5a. As to the evidence that the union's position was not a bona fide contract

interpretation, but a *post hac* rationalization for a series of indefensible failures to act, the appeals court weighed the evidence against the petitioner, the non-moving party, on the basis of the court's own speculation: "A variety of unknown factors might have motivated the union in those prior instances." App. 5a.

The court below acknowledged that the union's first response to the employer's timeliness objection in this case was not to assert its alleged contract interpretation, but hurriedly to provide *untimely* notice to the *wrong* arbitrator, and that the union concealed its bungled attempt at notice from Arbitrator Frost. Nevertheless, the court refused to acknowledge the permissible inference favoring the non-moving party of such evidence on summary judgment. The court reasoned that the union's concealment of this evidence from Arbitrator Frost was not irrational, since to reveal its bungled and untimely attempt at notice "could be construed as an acknowledgment that the CBA required such notice." App. 5a-6a. The court of appeals failed to acknowledge that its own articulation of why the union acted rationally in concealing its own bungling from the arbitrator was precisely why the evidence supported the petitioner's fair representation claim.

REASONS FOR GRANTING THE WRIT

THE DECISION BELOW CONFLICTS WITH DECISIONS OF THIS COURT AND OTHER CIRCUITS AND RAISES IMPORTANT QUESTIONS OF LAW THAT THIS COURT SHOULD RESOLVE

1. The "rationality" standard for the "arbitrary action" prong of the duty of fair representation in contract administration has received varied and conflicting definition in the lower courts following *ALPA v. O'Neill*, 499 U.S. 65 (1991). The Second Circuit recently endorsed the Ninth Circuit standard of liability for

> "acts of omission which, while not calculated to harm union members, 'may be so egregious, so far short of minimum standards of fairness to the employee and so unrelated to legitimate union interests as to be arbitrary.' " [6]

The Tenth Circuit has endorsed a fiduciary standard of care.[7] The Seventh Circuit has abandoned its requirement of bad faith or invidiousness as an element of the claim.[8]

The post-*ALPA* decisions of the court below have been inconsistent.[9] The decision below conflicts with the post-*ALPA* decisions of other courts and defines *ALPA*'s rationality standard as an illusory safeguard against irresponsible union representation.

It is important that this Court elaborate upon the meaning of the fiduciary models expressly approved in *ALPA*: the duty of a trustee that was urged in dissent by Justice Kennedy in *Terry v. Teamsters*, 494 U.S. 558,

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[6] *Cruz v. International Brotherhood of Electrical Workers, Local 3*, 34 F.3d 1148, 1153 (2d Cir. 1994) (Pierce, J.), quoting and following the liability standard articulated in *Robesky v. Qantas Empire Airways Ltd.*, 573 F.2d 1082, 1090 (9th Cir. 1978).

[7] *Aguinaga v. United Food and Commercial Workers International Union*, 993 F.2d 1463, 1470-71 (10th Cir. 1993).

[8] *Herman v. Carpenters Local 971*, —— F.3d ——, 149 LRRM 2648, 2650-51 (7th Cir. 1995); *Garcia v. Zenith Electronics Corp.*, 58 F.3d 1171, 1176 n.2 (7th Cir. 1995); see *Bennett v. Local Union No. 66*, 958 F.2d 1429, 1437-1439 (7th Cir. 1992).

[9] The court below applied substantially different standards in each of its three most recent decisions. In addition to the decision below, compare *Black v. Ryder/P*I*E* Nationwide, Inc.*, 15 F.3d 573 (6th Cir. 1994) (burden of proof requires proof that union's conduct was "*extremely* arbitrary"; plaintiff met burden by showing union failed to interview or call the one witness who could have exonerated grievant) (emphasis added); with *Linton v. UPS*, 15 F.3d 1365 (6th Cir. 1994) (summary judgment for defendants reversed where union's failure to process grievance was based not on merits, but on fact that "company's position, right or wrong, was intractable").

584-88 (1990); and the fiduciary relationship between attorney and client urged by Justice Stevens in *Terry*, 494 U.S. at 582, or owed by a corporate officer toward shareholders. *ALPA*, 499 U.S. at 74, 75. This Court in *ALPA* cited with approval the standard of care imposed upon a trustee by the *Restatement (Second) of Trusts*, § 174 (1959), without indicating the extent to which this Court was actually adopting that standard.[10]

For the lack of clear definition, the historical "impenetrable ambiguity" of the cause of action[11] continues to cause injustice and unnecessary litigation of cases that might never be filed or might be settled if the standards were clearer.

Neither the tort nor fiduciary models work satisfactorily *in unmodified form* as models for a union's duty to represented employees. The tort standard, specifically a neg-

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[10] "The trustee is under a duty to the beneficiary in administering the trust to exercise such care and skill as a man of ordinary prudence would exercise in dealing with his own property; and if the trustee has or procures his appointment as trustee by representing that he has greater skill than that of a man of ordinary prudence, he is under a duty to exercise such skill."

The commentary explains:

"A trustee is liable for a loss resulting from his failure to use the care and skill of a man of ordinary prudence, although he may have exercised all the care and skill of which he was capable. On the other hand, if the trustee has a greater degree of skill than that of a man of ordinary prudence, he is liable for a loss resulting from the failure to use such skill as he has."

* * * *

"Whether the trustee is prudent in the doing of an act depends upon the circumstances as they reasonably appear to him at the time when he does the act and not at some subsequent time when his conduct is called in question."

[11] B. Aaron, "An Overview," in J.T. McKelvey, *The Changing Law of Fair Representation* 16 (1985).

ligence standard, has been widely criticized and overwhelmingly rejected by the courts, as unrealistically demanding and overly burdensome upon unions.[12] A literal fiduciary standard may be both too demanding, imposing liability for simple negligence, and not demanding enough, excusing unions for misconduct based upon legal counsel. See, e.g., Michigan's statutory definition of a corporate officer's fiduciary duty. M.C.L.A. §§ 1541a(1)(b) (liability for simple negligence), 1541a(2) (no liability for actions based upon professional advice).[13]

It is unlikely that this Court, in endorsing a fiduciary standard of care in *ALPA*, intended the lower courts to adopt in unmodified form the duty owed by a corporate officer to shareholders or the duty of an attorney to his client. Yet the fiduciary analogy provides a much needed moderating influence upon the rationality standard of care. This Court needs to provide the lower courts with a substantive definition of the fiduciary duty approved in *ALPA*.

Petitioner submits that an appropriate model for a rationality standard moderated by fiduciary elements is offered by the Second and Ninth Circuits' articulation of the standard governing acts of omission: conduct "so egregious, so far short of minimum standards, of fairness to the employee and so unrelated to legitimate union in-

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[12] See *Robesky v. Qantas Empire Airways Ltd.*, 573 F.2d 1082 (9th Cir. 1978) (Kennedy, J., concurring separately). Probably the closest any court has come to adopting a negligence standard was the decision of the court below in *Ruzicka v. General Motors Corp.*, 523 F.2d 306 (6th Cir. 1975). It was repudiated in later proceedings in the same case. 649 F.2d 1207 (1981).

[13] The federal labor laws impose both civil and criminal liability upon union officers for breaching specified statutory fiduciary operations. *E.g.*, Labor-Management Relations Act, section 302(b), 29 U.S.C. § 186(b); Labor-Management Reporting and Disclosure Act of 1959, section 501(a), 29 U.S.C. § 501(a); Employee Retirement Income Security Act, section 409(a), 29 U.S.C. § 1109(a).

terests as to be arbitrary." *Cruz v. International Brotherhood of Electrical Workers, Local 3, supra,* 34 F.3d at 1153.

A fiduciary standard of care would not have allowed summary judgment for respondents in this case, in which the union repeatedly capitulated to the employer's interpretation of the expedited grievance procedure, consistently losing on timeliness grounds every discharge grievance that the union deemed worthy of arbitration.[14] Such conduct is incompatible with even a relaxed fiduciary standard of care. No corporate officer would repeatedly act in a manner guaranteed to cause nothing but injury to his business and benefit to its competitors; and no attorney would consistently follow procedures guaranteed to lose case after case.

2. The decision below conflicts with this Court's definition of "arbitrary" action in *ALPA*. *ALPA's* rationality standard is an inquiry into the *adequacy* of the union's representation, 499 U.S. at 75, not a labor law equivalent of the fourteenth amendment's "rational basis" test.[15]

The district court below found that the union's actions were shielded from jury scrutiny because they could "not be called wholly irrational." App. 11a. The appeals court panel concluded that the union was shielded from trial because "[a] variety of unknown factors might have

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[14] Ironically, the union's conduct was more favorable to grievants having weak discharge cases than to grievants having clearly meritorious cases. A union is more likely to be willing to compromise weak cases by pre-arbitration settlement agreements than cases that it deems so strong on the merits that compromise is unwarranted.

[15] *Lewis v. Tuscan Dairy Farms, Inc.*, 829 F. Supp. 665, 668 (S.D.N.Y. 1993), on remand for further consideration in light of *ALPA v. O'Neill, Alier v. Tuscan Dairy Farms*, 979 F.2d 946 (2d Cir. 1992).

motivated the union" in earlier discharge cases under the expedited arbitration provision. App. 5a. In effect, both courts below applied their own respective articulations of a too generously forgiving fourteenth amendment "rational basis" standard of judicial review, granting summary judgment because some unarticulated rationale for the union's conduct was *conceivable*. The court below erroneously interpreted this Court's rejection in *ALPA* of separate DFR standards for contract negotiations and contract administration as a signal that the same "wide lattitude" granted to union decision-making in the context of collective bargaining to end a strike was an equally appropriate measure of the degree of care to be expected from unions in processing discharge grievances.

A legislative "rational basis" test is an inappropriate model for the duty of fair representation, for at least two reasons. First, a legislature does not stand in a fiduciary relationship to the citizenry. *ALPA*'s rationality standard, on the other hand, governs decisions and actions affecting the welfare of employees that the union, exclusively, is empowered to make and that the affected employees themselves lack the power to control and sometimes even to influence. Second, the fourteenth amendment rational basis test applies only to statutes that do not implicate any fundamental right or suspect classification, while *ALPA*'s rationality standard governs *all* cases, including, as in this case, workplace "capital punishment" having potentially devastating and wide-ranging impact upon the worker, his or her family, and their future livelihoods. Even less potentially cataclysmic grievance cases often profoundly affect the most basic aspects of a worker's life: his earnings, hours, the safety and quality of life in the place he spends most of his time—his workplace.

While this Court admonished in *ALPA* that the rationality standard is moderated by the "factual and legal landscape," so-called "garden variety hybrid section 301

cases" have often suffered cruelly ritualistic fates, despite the desperation implicit in a federal court lawsuit filed by an unemployed head of household. It is inappropriate for courts to dispose of cases that involve such fundamental human interests as are involved in the typical "garden variety hybrid section 301 case" by ritualistic formulas, without meaningful attention to the merits.

The odds of winning a hybrid DFR case are staggeringly small. "An analysis of the data available . . . leaves little doubt that plaintiffs hardly ever prevail in duty of fair representation litigation." Goldberg, "The Duty of Fair Representation: What the Courts Do in Fact," 34 *Buffalo L. Rev.* 89, 135 (1985):

> [P]laintiffs prevailed on the merits of their claim in only 4.3% of the duty of fair representation cases generating published opinions between 1977 and 1983, and they prevailed in an even smaller percentage (1.6) of the cases filed in three district courts between 1977 and 1982. . . . [S]ettlements favorable to plaintiffs were obtained in . . . 3.7% of the total number of cases surveyed in the courthouse files." *Id.* 136.

A rationality standard that compels judgment against the nonmoving party on the basis of "unknown factors" that "might" have motivated the moving party provides an illusory cause of action—the sort of standard that produces a 3.7% success rate.

3. The decision by the court below conflicts with the established rule of DFR liability that a union is liable for failing to meet a contractual deadline that deprives the grievant of a hearing on a discharge grievance deemed meritorious by the union. In the decision below, the court excused a union from the catastrophic consequences of its failure to file timely, despite a "consistent and firm" employer past practice of refusing to excuse untimeliness. The panel's decision in the instant case cannot be recon-

ciled with the settled rule of union liability, followed by the First, Second, Fourth, and Ninth Circuits, and until now by the Sixth Circuit, for unintentional acts or omissions evidencing reckless disregard for the employee's rights and severely injuring his interests.[16]

CONCLUSION

Petitioner respectfully requests the Court to grant the writ of certiorari.

Respectfully submitted,

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January 16, 1996

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[16] *Young v. United States Postal Service*, 907 F.2d 305 (2d Cir. 1990); *Dutrisac v. Caterpiller Tractor Co.*, 749 F.2d 1270 (9th Cir. 1983); *Robesky v. Qantas Empire Airways Ltd.*, 573 F.2d 1082, 1090 (9th Cir. 1978) (collecting cases); *Foust v. International Bhd. of Electrical Workers*, 572 F.2d 710 (10th Cir. 1978), *mod. to reverse award of punitive damages*, 442 U.S. 42 (1979); *Ruggirello v. Ford Motor Co.*, 411 F. Supp. 758, 760 (E.D. Mich. 1976); see *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554 (1976); cf. *Milstead v. International Bhd. of Teamsters*, 580 F.2d 232 (1978) (union breached DFR by processing grievance under terms of expired labor agreement); but cf. *Ruzicka v. General Motors Corp.*, 649 F.2d 1207 (6th Cir. 1981) (*Ruzicka II*) (union not liable for "failure to timely file the grievance . . . due to reliance on the prevailing practice of freely granted extensions").

APPENDICES

APPENDIX A

[Filed Aug. 29, 1995]

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 94-1187

GREGORY MURRAY,
Plaintiff-Appellant,

v.

DETROIT RIVERVIEW HOSPITAL; DETROIT-MACOMB HOSPITAL CORP.; DETROIT RIVERVIEW HOSPITAL WORKERS LOCAL 2435, AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES (AFL-CIO), a labor organization; and MICHIGAN AFSCME COUNCIL 25 (AFL-CIO), a labor organization,
Defendants-Appellees.

On Appeal from the United States District Court
for the Eastern District of Michigan

OPINION

BEFORE: BROWN, KENNEDY and NORRIS, Circuit Judges.

ALAN E. NORRIS, Circuit Judge. Plaintiff Gregory Murray brought this hybrid suit against Detroit Riverview Hospital and the union that represented him, Detroit Riverview Hospital Workers Local 2435, after the hospital terminated his employment. The district court

granted summary judgment in favor of defendants, and Murray appealed.

I.

The hospital fired Murray on April 1, 1991 for allegedly breaking a work rule. He contends that the firing was in retaliation for his activities as a steward of the union, which is a local affiliate of the American Federation of State, County, and Municipal Employees (AFSCME) and Michigan AFSCME Council 25 (Council 25).

The 1988 through 1990 collective bargaining agreement (CBA) between the hospital and the union established a special procedure for the resolution of employee discharge grievances. Under that procedure, if the union was dissatisfied with the answer provided by the hospital at the fourth step of the grievance procedure, it was required to present an arbitration demand to the hospital within fourteen days of receipt of the hospital's answer. In the CBA provision at the center of this controversy, it continued, "Upon filing of a demand for arbitration, [the demand] shall be submitted to" the appropriate arbitrator.[1] In 1989, the hospital notified the union that, in contrast to the union's interpretation, it read the CBA as requiring the union to notify the arbitrator simultaneously when filing a demand for arbitration with the hospital.

The union filed a grievance on Murray's behalf on April 5, 1991. The hospital denied the grievance at step four. The union timely presented a demand for arbitration to the hospital on May 1, 1991 but, in keeping with its interpretation of the disputed provision, did not notify the arbitrator. At some uncertain point, the union notified arbitrator Joseph Girolamo who, since he was not the next arbitrator in the rotation, was not the appropriate arbitrator to notify. The hospital, in accordance with

[1] The CBA created a panel of five pre-selected arbitrators, rotating automatically. The arbitrator to whom notice was to be given was the one whose name was next in the rotation.

its view of the disputed clause, treated the arbitration demand as untimely and refused to arbitrate the grievance. The union therefore filed unfair labor practice charges with the Michigan Employment Relations Commission (MERC).[2]

Since it was not the appropriate forum in which to lodge them, the MERC dismissed the charges for lack of jurisdiction. The union did not refile the charges with the National Labor Relations Board (NLRB), the body that has jurisdiction over such claims. Murray learned of the dismissal of the MERC charges on November 6, 1991 but did not file a charge against the union.

The hospiltal eventually agreed to arbitrate Murray's grievance in a bifurcated fashion. The arbitrator would first consider whether the grievance was arbitrable despite the union's failure to notify the arbitrator upon making its demand for arbitration. If so, the arbitrator would proceed to consider the merits of the grievance. At the first stage, the union argued, as it does here, that the CBA's provision for notice to the arbitrator does not impose a duty on either party but instead gives both parties the right to notify the arbitrator in order to expedite the proceedings. The arbitrator rejected that argument and concluded that the CBA obligates the union to notify the arbitrator upon demanding arbitration. The arbitrator concluded that the union's failure rendered the grievance non-arbitrable and therefore dismissed it.

Murray sued the hospital and the union, claiming that the hospital had violated the CBA by firing him and that the union had violated its duty of fair representation by failing to notify the arbitrator of its intent to arbitrate his grievance. The parties agreed to hold discovery in

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[2] The unfair labor practice charges alleged that the hospital had unlawfully fired Murray and two other union members—Regina Shorter and Darlene Baker—because of their union affiliation and had violated the CBA by refusing to arbitrate their grievances.

abeyance and file cross-motions for summary judgment by December 13, 1993. The parties filed cross-motions for summary judgment on December 13, 1993. Murray, at the same time, moved for leave to file a second amended complaint. The district court granted the union's and the hospital's motions for summary judgment and denied Murray's motions. He now challenges the district court's rulings.

II.

We review the district court's grant of summary judgment *de novo*. *International Ass'n of Machinists and Aerospace Workers, Local 2770 v. Lourdes Hosp., Inc.*, 958 F.2d 154, 156-57 (6th Cir. 1992). Summary judgment is appropriate if the pleadings, affidavits, and fruits of discovery "show that there is no genuine dispute as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c).

Murray argues that the union breached its duty of fair representation by failing to satisfy the CBA's arbitrator notice requirement. To succeed, he must show that the union's conduct was "arbitrary, discriminatory, or in bad faith." *Vaca v. Sipes*, 386 U.S. 171, 190 (1967). "[A] union's actions are arbitrary only if, in light of the factual and legal landscape at the time of the union's actions, the union's behavior is so far outside a 'wide range of reasonableness,' as to be irrational." *Air Line Pilots Ass'n, Int'l v. O'Neill*, 499 U.S. 65, 67 (1991) (citation omitted); *see also United Steelworkers of America v. Rawson*, 495 U.S. 362, 372-73 (1990); *Black v. Ryder/P.I.E. Nationwide, Inc.*, 15 F.3d 573, 584 (6th Cir. 1994).

Murray cannot satisfy this heavy burden. The CBA's arbitrator notice provision is unclear. Whereas other provisions in the CBA impose specific duties on specific parties, the disputed provision does not. Rather, it states, "upon filing of a demand for arbitration, it shall be submitted to [the appropriate] arbitrator." Since the pro-

vision does not refer to the union or the hospital, the union's interpretation of it as not imposing a requirement on either party is one sensible construction.

Murray argues, however, that the union's past conduct indicates that it actually knew its reading of the CBA to be untenable. He points to the fact that prior to the Baker case, which arose around the same time as Murray's, the union withdrew arbitration demands each time the hospital objected to the union's failure to notify the arbitrator. It does not follow necessarily that the union's past conduct amounts to a tacit admission that the hospital's interpretation is correct. A variety of unknown factors might have motivated the union in those prior instances. Murray's argument in this regard is further weakened by the fact that the union zealously advocated its interpretation of the CBA in this case and in the Baker and Shorter cases.

The union's interpretation of the CBA was one reasonable interpretation that happened to advance the union's strategic concerns. Especially since the union vigorously advocated that interpretation, its conduct cannot be called irrational.

Murray also argues that the union's assertion to the district court that it did in fact notify an arbitrator raises the question of whether the union violated its duty of fair representation by failing to present—in the arbitration to determine arbitrability—an available persuasive argument in favor of arbitrability. At arbitration, the union did not argue that it had in fact notified the arbitrator; instead, it argued that the CBA did not obligate it to do so.

While the failure to present an argument might in some cases be deemed irrational conduct, two factors preclude that conclusion in this case. First, in view of the conceded flaws in the purported notice—it was submitted to the wrong arbitrator and cannot be shown to have been submitted in a timely fashion—the arbitrator would have almost surely rejected an argument by the union that it

actually provided notice. Moreover, arguing that it actually notified an arbitrator could be construed as an acknowledgment that the CBA required such notice. Such an acknowledgement would have weakened the union's strongest argument, *i.e.*, that the CBA did not require the union to notify the arbitrator. Under these facts, the union's failure to argue that it actually notified the arbitrator cannot be called irrational.

Because we conclude that the union's conduct in the prosecution of Murray's grievance fell well wthin a "wide range of reasonableness," we reject Murray's contention that the union breached its duty of fair representation.

III.

Murray, in his second amended complaint, sought to assert that the union breached its duty of fair representation by intentionally allowing the statute of limitations to run before lodging an unfair labor practice charge with the NLRB. He challenges the district court's denial of his motion to amend his complaint to add this allegation.[3] We review the district court's denial of his motion for abuse of discretion. *Prather v. Dayton Power & Light Co.*, 918 F.2d 1255, 1259 (6th Cir. 1990), *cert. denied*, 501 U.S. 1250 (1991). While leave to amend is to be freely granted, Fed. R. Civ. P. 15(a), it is to be denied if the amendment would be futile, would result in undue delay or prejudice to the opposing party, or was brought in bad faith. *Foman v. Davis*, 371 U.S. 178, 182 (1962).

In his proposed second amended complaint, Murray alleged that the union acted in bad faith by intentionally concealing and failing to inform him of its negligent mis-

[3] While Murray's notice of appeal referred to only the district court's grant of summary judgment, this issue is properly before us because an appeal from a final judgment, such as the district court's grant of summary judgment, draws into question all prior non-final orders. *Caldwell v. Moore*, 968 F.2d 595, 598 (6th Cir. 1992).

filing of the unfair labor practice charge with the MERC —rather than with the NLRB—even though the union learned of its misfiling while there was still time to remedy it. We are unable to say that the district court's denial of leave to assert this claim was an abuse of discretion, since allowing the proposed amendment would have prejudiced defendants and would have been futile. Murray filed his motion on the stipulated date for the submission of summary judgment motions. Granting Murray's last minute motion would have caused defendants to, in effect, start over after having prepared a summary judgment motion and its supporting documents. Since Murray failed to provide a persuasive justification for the delay, it follows that it was undue delay under the circumstances of this case, and that allowing the amendment would have resulted in undue prejudice to the defendants.

IV.

For the foregoing reasons, we affirm the district court's order granting defendants' motions for summary judgment and its order denying Murray's motion for leave to amend his complaint.

APPENDIX B

[Filed Jan. 31, 1994]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Case No. 93-CV-73727-DT

Hon. Anna Diggs Taylor

GREGORY MURRAY,

Plaintiff,

vs.

DETROIT RIVERVIEW HOSPITAL, DETROIT-MACOMB HOSPITAL CORP., and DETROIT RIVERVIEW HOSPITAL WORKERS LOCAL 2435, AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES (AFL-CIO), a labor organization, and MICHIGAN AFSCME COUNCIL 25 (AFL-CIO), a labor organization

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ORDER GRANTING DEFENDANTS' MOTIONS TO DISMISS AND OR SUMMARY JUDGMENT AND DENYING PLAINTIFF'S CROSS MOTION FOR SUMMARY JUDGMENT

Defendants Detroit Riverview Hospital Workers Local 2435, AFSCME, and Michigan AFSCME Council 25, AFL-CIO, having moved to dismiss and for summary judgment; defendants Detroit Riverview Hospital and Detroit-Macomb Hospital Corporation having moved for summary judgment; and plaintiff Gregory Murray having

cross moved for summary judgment; and the parties having submitted briefs, affidavits and exhibits in support of their respective motions, and presented oral arguments in open court,

IT IS HEREBY ORDERED, for the reasons stated on the record, that defendants' motions to dismiss and for summary judgment shall be granted, and plaintiff's cross motion for summary judgment shall be denied.

IT IS FURTHER ORDERED, for the reasons stated on the record, that this cause shall be dismissed with prejudice, each party to bear its own costs.

So ordered.

/s/ Anna Diggs Taylor
United States District Judge

Dated: Jan. 31, 1994

Approved as to form *ONLY*:

/s/ Barbara Harvey
BARBARA HARVEY (P25478)
2915 Cadillac Tower
Detroit, MI 48226
(313) 963-3570
Attorney for Plaintiff

Dated: January 24, 1994

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Civil Action No. 93 CV 73727 DT

GREGORY MURRAY,

Plaintiff,

v.

DETROIT RIVERVIEW HOSPITAL, DETROIT-MACOMB HOSPITAL CORPORATION, and DETROIT RIVERVIEW HOSPTAL WORKERS LOCAL 2435, AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES (AFL-CIO), and MICHIGAN AFSCME COUNCIL 25 (AFL-CIO),

Defendants.

CROSS-MOTIONS FOR SUMMARY JUDGMENT

BEFORE THE HONORABLE ANNA DIGGS TAYLOR
United States District Judge

Monday, January 24, 1994

* * * *

[44] THE COURT: All right. Thank you.

The Court does find, as a matter of undisputed fact to the contrary, that the union did all within its power to adjudicate the propriety of their interpretation on the requirements to submit a discharge to expedited arbitration.

For all the reasons argued by the defendants here, [45] the Court is going to grant the summary judgment re-

quested by the defendants and deny the plaintiff's. And I will also deny plaintiff's motion for leave to amend the complaint for the reasons argued by the defense here.

On the undisputed facts, this union did not act outside the wide range of reasonableness that is afforded to a union representing its bargaining unit. Its actions cannot be called wholly irrational. There was no negligence, arbitrariness, discriminatory conduct, or bad-faith conduct.

A new contract clause had been negotiated into the contract here applicable, apparently, which stated,

> *"Upon filing a demand for arbitration, it shall be submitted to an arbitrator selected on a rotation basis from a jointly agreed-upon list."*

By the time plainitff's discharge grievance reached this stage, the ambiguous language I have just quoted had still not been adjudicated by an arbitrator. There had been other discharge grievances, but the union had a practice of demanding arbitration on every discharge grievance, apparently, and then seeking council approval, that is, Council 25 of AFSCME AFL-CIO, before engaging an arbitrator.

So, although a number of grievances were withdrawn, the issue had not been joined until the three grievances that reached this stage, apparently, about the time plaintiff's did. [46] Two of those arbitrators decided against the union. Unfortunately, one of them was plaintiff's arbitrator on the question of arbitrability, Ms. Frost; and one decided in favor of the union's interpretation, but said that the union mat not demand back pay for the period of delay between the demand for arbitration and notice to an arbitrator.

But although the facts are fairly clear, and because the facts are fairly clear—they're certainly undisputed—the Court must find that there was no breach of duty of fair representation. The union simply made an error of judgment or a business error, a misinterpretation of the manner in which a new contract should be administered, and there was no breach here against this plaintiff.

There was also, of course, no breach of duty in the entire transaction involving taking his unfair labor practice to MERC instead of to the NLRB. The purpose of that unfair labor practice was to obtain arbitration. An arbitration on the issue of arbitrability, first of all, was obtained; unfortunately, the plaintiff's grievance was lost on that question, but the employer did go to arbitration on that issue, as the unfair labor practice, had it been timely and filed at the proper place, would've achieved.

So, for all those reasons and all those argued by the defendants here, the motions must be denied, of plaintiff, defendants' granted.

[47] Please prepare an order, would you?

MS. KLASS: Yes, Your Honor.

(Motion hearing concluded 2:18 PM)

APPENDIX D

[Filed Oct. 17, 1995]

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 94-1187

GREGORY MURRAY,
Plaintiff-Appellant,

v.

DETROIT RIVERVIEW HOSPITAL, *et al.*,
Defendants-Appellees.

ORDER

BEFORE: BROWN, KENNEDY, and NORRIS, Circuit Judges.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
LEONARD GREEN
Clerk

(2)

No. 95-1136

Supreme Court, U.S.
FILED
FEB 16 1996
CLERK

In The

Supreme Court of the United States

October Term, 1995

GREGORY MURRAY,

Petitioner,

vs.

DETROIT RIVERVIEW HOSPITAL, DETROIT-MACOMB HOSPITAL CORP., DETROIT RIVERVIEW HOSPITAL WORKERS LOCAL 2435, AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES(AFL-CIO), *a labor organization, and* MICHIGAN AFSCME COUNCIL 25 (Afl-Cio), *a labor organization,*

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF IN OPPOSITION FOR RESPONDENTS DETROIT-MACOMB HOSPITAL CORP. AND DETROIT RIVERVIEW HOSPITAL

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QUESTIONS PRESENTED

1. Whether the Union engaged in wholly irrational conduct that was outside the wide range of reasonableness accorded to it when it interpreted the Collective Bargaining Agreement as not requiring it to provide notice to the arbitrator simultaneously with its demand for arbitration.

2. Whether this Court, in *Air Line Pilots Ass'n, Int'l v. O'Neill*, 499 U.S. 65 (1991), created a new test for determining when a union breaches its duty of fair representation thereby eliminating the longstanding standard first set forth in *Vaca v. Sipes*, 386 U.S. 171 (1967).

PARTIES TO THE PROCEEDINGS

All parties to the proceeding in the court below are listed in the caption. Detroit-Macomb Hospital Corporation operates a facility known as Detroit Riverview Hospital. Although Detroit Riverview Hospital has been named as a party in this matter, it is not a separate legal entity.

Detroit-Macomb Hospital Corporation is not a subsidiary of any other corporation. It has the following non-wholly owned subsidiaries: Selectcare Health Insurance Company; Macomb MRI; Wayne Macomb MRI; and Michigan Hospital Association Insurance Company.

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APPENDIX

Appendix A — Opinion of the United States Court of Appeals for the Sixth Circuit Filed August 29, 1995 . 1a

Appendix B — Order of the United States Court of Appeals for the Sixth Circuit Filed October 17, 1995 ..... 9a

COUNTERSTATEMENT OF THE CASE

A. Procedural History.

Petitioner brought this § 301[1] case alleging that his employer breached the Collective Bargaining Agreement when it discharged him and that his Union breached its duty of fair representation when it failed to adopt the employer's interpretation of the Collective Bargaining Agreement on the issue of dual notification of intent to arbitrate of an admittedly ambiguous provision of the contract which is subject to conflictive interpretation. (R. 1).

The facts in this case relating to the Union's processing of Murray's grievance were identical to the facts in *Baker v. Detroit-Macomb Hospital Corp.*, 834 F. Supp. 216 (E.D. Mich. 1993), *aff'd*, 57 F.3d 1069 (6th Cir. 1995). Because no material facts were disputed with respect to the issue of whether the Union had breached its duty of fair representation, the parties agreed to rely on the discovery conducted in the *Baker* case and to stay discovery in the instant case pending Cross Motions for Summary Judgment on that issue. (R. 10). Judge Anna Diggs Taylor of the Eastern District of Michigan granted Respondents' Motions and denied Petitioner's Motion for Summary Judgment concluding that the Union's refusal to accept the employer's interpretation of the contract was not a breach of the Duty of Fair Representation. (R. 32). Judge Taylor also denied Petitioner's Motion for Leave to file a Second Amended Complaint which had been filed concurrently with the Motions for Summary Judgment. (R. 31).

The Court of Appeals for the Sixth Circuit affirmed the

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1. Section 301 of the Labor-Management Relations Act. 29 U.S.C. § 185(a).

District Court's rulings. (Resp. App. 8a). Petitioner's Request for Rehearing and Suggestion for Rehearing En Banc were also denied by the Sixth Circuit. (Resp. App. 9a). Petitioner then filed his Petition for Writ of Certiorari with this Court.

B. Statement Of Facts.

Gregory Murray was employed by Detroit-Macomb Hospital Corporation (the "Hospital") in Detroit Riverview Hospital's Patient and Public Reception Department.[2] Murray was terminated on April 1, 1991, for leaving his post without being relieved.[3] Murray's employment was covered by a Collective Bargaining Agreement (the "Agreement") between Detroit Riverview Hospital and AFSCME, Michigan Council 25, Local 2435 (the "Union"). The Agreement provided for a grievance and arbitration procedure to resolve Union members' concerns regarding discipline up to and including discharge. In accord with the Agreement, the Union filed a timely grievance on Murray's behalf on April 5, 1991. The Hospital timely denied Murray's grievance by its Step 4 response dated April 19, 1991.

The Agreement contained an expedited procedure for appealing grievances over disciplinary discharges to arbitration if the matter was not resolved at the Step 4 level. This expedited procedure, which goes to the heart of this case, provided as follows:

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2. Detroit-Macomb Hospital Corporation owns and operates two hospitals. In addition to Detroit Riverview Hospital, which is located in Detroit, Michigan, it also operates Macomb Hospital Center in Warren, Michigan.

3. Although Petitioner contends that he was wrongfully discharged as a matter of law, that issue was never before either of the lower courts. Instead, all of the parties to this matter agreed to limit the courts' review only to the issue of whether the Union had breached its duty to the Petitioner. (R. 10).

> If the grievance is not resolved at Step 4, either party may give notice to the other party of its intent to arbitrate such grievance. Such notice shall be given within fourteen (14) calendar days (including Saturdays, Sundays and holidays) of the receipt of the Hospital's Step 4 answer. Arbitration demands shall be filed in one of the following ways:
>
> (1) grievances involving layoff, recall from layoff, discharge or disciplinary suspension shall be processed through an expedited procedure. These grievances shall be heard by an arbitrator drawn from a preselected list of five (5) mutually agreed upon names . . .
>
> (a) Upon filing a demand for arbitration, it shall be submitted to an arbitrator selected on a rotation basis from the jointly agreed upon list. . . .

(R. 11, Exhibit A to the Hospital's Brief in Support of Motion for Summary Judgment, Article V, Section 4, Step 5). It is undisputed that the Union gave a timely notice of its intent to arbitrate to the Hospital within the 14-day time limit. This dispute arose out of the issue of whether the Union was required to provide dual notification within the 14-day period by notifying *both* the Hospital and the Arbitrator of its intent to arbitrate. The Union asserts that it complied with the time limits by notifying the Hospital and that the contract imposed no time limits for actual notice to the Arbitrator. The Hospital contends that dual notification is required within the 14-day period. Although both the Hospital and the Union vigorously contend that "their" interpretation is the correct one, neither side disputes

that the language in section (1)(a) is ambiguous. The language of (1)(a) is in the passive voice and does not identify who is responsible for submitting the grievance to arbitration nor does it state specifically when the arbitrator must be informed of the demand.

The Union and the Hospital disagreed about the meaning of paragraph (1)(a) almost from the very first day that it was implemented. The Hospital has always interpreted the language to mean that, within fourteen days of the Step 4 Response, the Union is required not only to notify the Hospital of its intent to appeal the grievance to arbitration but also must provide dual notification to the preselected arbitrator. (R. 11, Exhibit D to the Hospital's Brief in Support of Motion for Summary Judgment).

The Union, on the other hand, has just as steadfastly insisted that its only obligation is to file an arbitration demand. The Union contends that it has no obligation to notify the arbitrator of his or her selection claiming, instead, that either party may notify the arbitrator if it wishes to push the matter forward more quickly. (R. 11, Exhibit D to the Hospital's Brief in Support of Motion for Summary Judgment, pp. 31, 37-38, 40, 46, 48). The Union further claimed that, because the provision does not set forth an express time limit during which the arbitrator must be notified of his or her selection, the arbitrator can be notified at any time. The Union has consistently interpreted the Agreement in this way with respect to all grievances filed prior to, at the same time as, and after the Murray grievance. (R. 11, Exhibit D to the Hospital's Brief in Support of Motion for Summary Judgment, p. 66). Needless to say, because of the diametrically opposing viewpoints of the parties to the Agreement, the issue was far from settled and prior to the filing of Murray's grievance, had never previously been examined by an arbitrator. (R. 11,

Exhibit D to the Hospital's Brief in Support of Motion for Summary Judgment, pp. 62-63, 66-67).[4]

The Union timely notified the Hospital of its demand to arbitrate on May 1, 1991 after receiving the Hospital's Step 4 response denying Murray's grievance dated April 19, 1991. (R. 11, Exhibit E to the Hospital's Brief in Support of Motion for Summary Judgment). However, in conformity with the Union's consistent interpretation of the contract, it did not notify the arbitrator of its intent to arbitrate Murray's termination grievance until later.

When the Hospital discovered that the Union had not notified the arbitrator at the same time that it filed its Arbitration Demand, the Hospital informed the Union that it would not proceed with the matter because it was the Hospital's position that the Union's failure to provide simultaneous notification to the arbitrator of its arbitration demand rendered the demand untimely. The Hospital also informed the Union that, because the demand was untimely, it considered the grievance settled. (R. 11, Exhibit F to the Hospital's Brief in Support of Motion for Summary Judgment).

In an attempt to force the Hospital to proceed, the Union filed a Charge, on June 12, 1991, with the Michigan Employment Relations Commission ("MERC") seeking to compel the Hospital to arbitrate Murray's grievance.[5] (R. 11, Exhibit D to the Hospital's Brief in Support of Motion for Summary

4. As discussed, *infra*, pp. 6-7, the timeliness issue was decided by two separate arbitrators during the pendency of Murray's grievance. One arbitrator decided in favor of the Union and one arbitrator decided in favor of the Hospital with respect to the issue.

5. This Charge was dismissed on jurisdictional grounds because it was filed with the wrong agency. (R. 11, Exhibit D to the Hospital's Brief in (Cont'd)

Judgment, p. 49). When the Charge was dismissed, the Union brought its legal counsel into the fray in an attempt to compel arbitration. After months of posturing, the Union and the Hospital ultimately entered into an Agreement to arbitrate the grievance in a bifurcated manner, with the issue of arbitrability to be decided first. (R. 11, Exhibit G to the Hospital's Brief in Support of Motion for Summary Judgment). At that point in time, the Hospital wrote a letter to Arbitrator Frost, on behalf of both parties, informing her of her selection as arbitrator over this matter. (R. 11, Exhibit H to the Hospital's Brief in Support of Motion for Summary Judgment).

In accordance with the parties' Agreement, an arbitration proceeding on Murray's termination grievance convened before Arbitrator Frost on January 11, 1993. Neither the Hospital nor the Union wavered from their interpretation of the contract at any time during the arbitration process. Instead, both Parties vigorously and consistently tried to prove that their interpretation of the language was the correct one. On February 11, 1993, after conclusion of the hearing and after reviewing the post-hearing briefs, Arbitrator Frost issued her decision in which she held that Murray's grievance was not arbitrable. (R. 11, Exhibit I to the Hospital's Brief in Support of Motion for Summary Judgment). Arbitrator Frost concluded that the Hospital's interpretation was correct and that the Union should have notified the arbitrator immediately upon or shortly after making its demand for arbitration in May of 1991.

In addition to Arbitrator Frost, two other arbitrators have also been called upon by the parties to decide this particular issue

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(Cont'd)

Support of Motion for Summary Judgment, p. 49). However, because the Charge only sought to compel arbitration, something which ultimately occurred, Murray was not injured by the misfiling.

of dual notification. In a case involving Regina Shorter, Arbitrator Daniel upheld the Union's position by his decision dated April 2, 1992. (R. 11, Exhibit J). In the other arbitration, that of Darlene Baker's grievance, Arbitrator Glendon upheld the position of the Hospital by his decision dated April 18, 1992. (R. 11, Exhibit K). All three Arbitrators ruled that the party initiating arbitration was required to notify the Arbitrator. However, that is where the similarities ended. Arbitrator Daniel found that the Union had properly invoked Step 5 because the Agreement did not contain any time limits for notifying the Arbitrator, nor did it contain any forfeiture clause for failing to make the submission to the Arbitrator. According to Arbitrator Daniel, once the Union had initiated Step 5 by filing its Arbitration Demand, the Union had preserved its rights and the Section 3 forfeiture clause had no effect. The other two Arbitrators concluded that in order to institute Step 5, the initiating party had to notify the Arbitrator soon after filing its Arbitration Demand.

REASONS FOR DENYING THE WRIT

A. Overview.

According to Supreme Court Rule 10, review on a Writ of Certiorari is only to be granted in very limited situations. Petitioner has identified three reasons why a Writ should be issued: (1) that there exists a split in the Circuits; (2) that the Sixth Circuit's affirmance of the District Court's Judgment was contrary to this Court's ruling in *Air Line Pilots Ass'n, Int'l v. O'Neill*, 449 U.S. 65 (1991); and (3) because a missed deadline is a breach of the duty of fair representation as a matter of law. As the following discussion will show, however, Petitioner's argument is seriously flawed.

Despite the Petitioner's attempt to show otherwise, there

clearly is no split among Circuits in this matter. This is a run-of-the mill Section 301 hybrid case. The rules governing such cases have not changed in any relevant respect since *Vaca v. Sipes*, 386 U.S. 171 (1967). Although Petitioner contends that the lower courts' decisions conflict with decisions of this Court and the decisions of other Circuits, the undisputed facts show otherwise. Here, Petitioner has alleged no more than negligence on the part of his Union because of the Union's refusal to accept the Hospital's interpretation of the contract. This Court, in conjunction with all of the Circuits cited by Petitioner, has consistently held that mere negligence is insufficient to support a claim alleging a breach of the duty of fair representation. *United Steelworkers v. Rawson*, 495 U.S. 362 (1990). *See also Achilli v. John J. Nissan Baking Co.*, 989 F.2d 561 (1st Cir. 1993) (mere negligence is not enough to show a breach of the duty of fair representation); *Ruzicka v. General Motors Corp.*, 649 F.2d 1207 (6th Cir. 1981) (ordinary negligence, without more, cannot establish a breach of the duty of fair representation).

Similarly, Petitioner's claim that the decision of the Eastern District of Michigan and the Court of Appeals for the Sixth Circuit conflict with this Court's decision is also without merit. Petitioner contends that the District Court's decision was incorrect because it ruled that the Union had not breached its duty because its actions were not wholly irrational. However, the District Court's decision was appropriate since this Court, in *Air Line Pilots Ass'n, Int'l v O'Neill*, 499 U.S. 65 (1991), specifically stated that a Union's conduct may "constitute evidence of a breach of duty only if it can be fairly characterized as so far outside a wide range of reasonableness, . . . that it is wholly 'irrational' or 'arbitrary'." *Id.* at 67. Thus a finding that the Union's conduct was not wholly irrational was both factually correct and consistent with the precedents set by this Court.

Similarly, Petitioner's claim that the Sixth Circuit

improperly utilized a rational basis test instead of the standard set forth by this Court is likewise without support. In fact, the Sixth Circuit cited this Court's own language when it identified the standard to be applied to this case:

> To succeed, he must show that the Union's conduct was "arbitrary, discriminatory or in bad faith". *Vaca v. Sipes*, 386 U.S. 171, 190 (1967). "[A] Union's actions are arbitrary only if, in light of the factual and legal landscape at the time of the Union's actions, the Union's behavior is so far outside a 'wide range of reasonableness,' as to be irrational." *Air Line Pilots Ass'n, Int'l v. O'Neill*, 499 U.S. 65, 67 (1991) . . . .

(Resp. App. 5a).

The Court of Appeals ruled that Murray could not meet that standard because the contract's language was ambiguous. The Sixth Circuit noted that while other parts of the contract imposed specific duties on specific individuals, provision (1)(a) did not. As a result, the Court of Appeals concluded that the Union's interpretation was a sensible one despite Murray's unsupported speculation of wrongdoing, and properly held that the Union's conduct was not a breach of the duty of fair representation.

Murray's final contention is that the Sixth Circuit's decision was contrary to the established rule that a failure to meet a contractual deadline is a breach. This claim is not supported by the facts. All parties agree that the language is ambiguous and does not provide a time limit for notifying the arbitrator. Moreover, the Union *did* comply with the only unambiguous time limit in the Agreement, that of filing an Arbitration Demand with the Hospital within the 14-day time period. Accordingly,

Petitioner's argument has no application whatsoever to the instant case. As such, and as this Court has consistently held since its decision in *Vaca*, Murray cannot prove a breach of the duty of fair representation under the facts presented here due to the absence of arbitrary conduct by his Union. Accordingly, this Petition should be denied.

B. The Undisputed Facts Did Not Show A Breach Of The Duty Of Fair Representation By The Union.

Judicial review of contractual grievance proceedings has been limited by the courts because federal labor policy encourages the private resolution of labor management disputes. As this Court is well aware, one of the limited circumstances in which a court can entertain an employee's action against his employer for breach of the Collective Bargaining Agreement is where the employee also alleges and proves that his Union breached its duty of fair representation in the processing of his grievance.

Because of the well established judicial deference to the remedies established by the parties for resolution of contractual disputes, the standard applied in fair representation cases is strict. The classic definition of the standard was set forth in *Vaca v. Sipes*, 386 U.S. 171, 190 (1967):

> A breach of the statutory duty of fair representation occurs only when the Union's conduct towards a member of the Collective Bargaining Unit is arbitrary, discriminatory, or in bad faith.

Even though this Court has consistently held that negligence alone is insufficient to rise to the level of arbitrary conduct by the union, Petitioner contends that this Court's

decision in *Air Line Pilots Ass'n, Int'l v. O'Neill*, 449 U.S. 65 (1991) eviscerated *Vaca* and created a new and higher duty for unions. According to Petitioner, unions are now held to the standards applicable to trustees and fiduciaries. While it is undisputed that a union acts in a pseudo fiduciary relationship to its members, this Court has never held that a union breaches its duty whenever its conduct could be construed as a mere breach of a fiduciary duty to one of its members. Moreover, even though it is the relationship between a union and its members that creates the union's duty of fair representation, the existence of such a relationship is not the standard for determining whether a breach of the duty of fair representation has occurred.

Instead, as this Court is well aware, *O'Neill* simply reiterated and explained the standards set forth in *Vaca* rather than eliminating them. In fact, *O'Neill* specifically requires that Petitioner show that his union's actions were "so far outside a wide range of reasonableness," as to be "wholly irrational" or "arbitrary" in order to prevail on his claims. *Id.* at 67.

By definition, when a union makes a specific decision as to its strategy in handling a particular grievance, this decision cannot constitute a breach of the duty of fair representation. Such a decision, even if ultimately determined to be mistaken, cannot be arbitrary or, in the words of the Supreme Court, "wholly irrational." *Id. See also, Ethier v. Postal Service*, 590 F.2d 733 (8th Cir.), *cert. denied*, 444 U.S. 826 (1979) (No breach of the duty where union steward "pursued the grievance with vigor and erred only in failing to anticipate how the Agreement would ultimately be construed by an arbitrator").

All parties agree that the Union's decision on when to notify the Arbitrator was not a mistake or a missed filing deadline. Instead, the Union demanded arbitration in a timely manner and interpreted the contract as not requiring it to inform the

Arbitrator at the same time. It is undisputed that the Union has consistently taken the same position in all grievances.[6] As Judge Gadola of the Eastern District of Michigan stated in a similar case:

> As a matter of law, however, the Union's conduct was anything but irrational. The Union's conduct was well within the wide range of reasonableness allowed by the Supreme Court. Although Plaintiff calls the Union's conduct "extremely risky", two weeks before Plaintiff's grievance was decided, a different arbitrator decided in favor of the Union's interpretation. After examining the relevant provision of the CBA, the Court is unable to declare that either interpretation of the grievance procedure is so clearly correct that an opposite contention would be irrational.
>
> Furthermore, rather than constituting arbitrary conduct, the Union's adherence to its position was long-standing and

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6. Murray contends that he has proof of arbitrary conduct because the Union withdrew its Arbitration Demands on six occasions when the Hospital objected on timeliness grounds. In making this contention, however, Murray presupposes a number of facts not supported by the evidence. First of all, there is no evidence that the six discharge cases represent all of the cases filed by the Union. In fact, the undisputed facts before the trial court showed that the Union did not withdraw its Demands in at least three cases, those of Murray, Baker and Shorter. Next, there is no evidence that the Union considered the grievances, where it withdrew its demands, to be meritorious. Finally, Murray provided no evidence that the Union withdrew its Demands because it believed that its interpretation of the contract was insupportable. Because Murray's contentions were not supported by any admissible evidence, they were properly ignored by the District Court.

> consistent. The Union followed its interpretation of the CBA for over four years. *Id.* at 10-11.

Baker v. Detroit-Macomb Hospital Corp., 834 F. Supp. 216 (E.D. Mich. 1993), *aff'd*, 57 F.3d 1069 (6th Cir. 1995).

In this case, the relevant inquiry is whether the Union's conduct was arbitrary. Here, there is no evidence of any arbitrary conduct by the Union. Murray was terminated for an offense, leaving his workstation without relief, which was grounds for termination under the Hospital's work rules. The Union, nevertheless, tried to get Murray reinstated. It processed his grievance, it demanded arbitration, it threatened litigation and, ultimately, prevailed in having the issue of timeliness arbitrated. The Union's conduct simply was not arbitrary. All that has been presented here is that a long-standing interpretation by the Union as to the requirements for perfecting an appeal to arbitration was rejected by Arbitrator Frost. While the Union was not successful in convincing this specific arbitrator that its position was correct, it has convinced another arbitrator of the reasonableness of its position and had taken the same stance in previous grievances.

Under these circumstances, the Union's conduct was not arbitrary or wholly irrational and the lower courts properly dismissed Petitioner's claims.[7]

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7. Finally, the National Labor Relations Board ("NLRB"), the federal agency charged with the administration of the National Labor Relations Act and oversight of labor relations, rejected the Petitioner's theory of a breach of the duty of fair representation on precisely the same facts. (R. 14, Exhibit L to the Union's Brief in Support of Motion for Summary Judgment). There, Darlene Baker charged that the Union failed to represent her fairly because it had not provided dual simultaneous notification to the arbitrator. The Board dismissed the charge on the grounds that the Union's conduct was not perfunctory or arbitrary but that the Union was actively attempting to compel the employer to arbitrate the grievance.

C. The District Court Did Not Abuse Its Discretion When It Refused To Grant Petitioner Leave To File His Second Amended Complaint.

On December 13, 1993, the same day that the Petitioner filed his Motion for Summary Judgment and after the Respondents had filed their Motion for Summary Judgment, Murray also filed a Motion for Leave To File Second Amended Complaint. By this Complaint, Murray sought to add a claim against his Union for misfiling the charge with the MERC in 1991. By his Declaration, he contended that he knew of the misfiling in November of 1991. In an attempt to avoid the statute of limitations problem, Murray claimed that the Union's conduct of intentionally concealing and failing to inform Murray of its negligent misfiling, even though the Union learned of the misfiling while there was still time to refile the charge with the NLRB, was a breach of the duty of fair representation.

Both the District Court and the Sixth Circuit found that Murray's proposed Second Amended Complaint was both futile and time barred on the following bases. It is undisputed that the Union filed an unfair labor practice charge and threatened litigation to compel arbitration in an attempt to get the Hospital to proceed to arbitration. While the Union misfiled its charge with the MERC instead of the NLRB, no one disputes that the Union, ultimately, was successful in forcing the Hospital to arbitrate the parties' disputes.

Since the Union was successful, Murray was not harmed by the mistaken filing. The fact that Murray cannot identify any injury caused by the misfiling compels the conclusion that the Union's conduct was not a breach of its duty of fair representation. In fact, the record reflects that the Hospital agreed to arbitration only after litigation was threatened and after the Union involved its attorneys in this matter.

Because mere negligence on the part of a Union is insufficient to state a claim for violation of the duty of fair representation, Murray's Motion For Leave To Amend was properly denied. *United Steelworkers v. Rawson*, 495 U.S. 362 (1990). Based upon Murray's failure to provide evidence that the misfiling was anything other than a mistake, he cannot prevail on this claim.[8]

Murray's claim that the Union's alleged failure to inform him of the misfiling and subsequent dismissal was a breach, is similarly meritless. While the time limit for filing an individual charge against the Hospital may have, arguably, passed by the time Murray found out about the dismissal of his charge, Murray still had plenty of time to file a charge with the NLRB *against the Union* premised upon the misfiling. Nonetheless, Murray chose not to do so, probably because he was aware that the Union had successfully compelled the Hospital to arbitrate. As a result, he cannot show a breach on this basis either.

Finally, any claim that the Union's misfiling was a breach was barred by the statute of limitations. It is well settled that duty of fair representation claims must be filed within six months of their accrual. *Del Costello v. International Brotherhood of Teamsters*, 462 U.S. 151 (1983). In his Declaration, Murray candidly admits that he knew of the Union's mistake by November of 1991. (R. 13, Declaration of Gregory Murray, ¶ 15). Nonetheless, he sat back, allowed the arbitration to proceed, waited for the results and when he lost, filed his initial Complaint on August 11, 1993, filed his First Amended Complaint on August 16, 1993 and never once raised this claim. It was not until after the Hospital moved for Summary Judgment that Murray finally raised the issue. However, because the claim

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8. Moreover, even if Murray had been injured, the NLRB had already concluded that this misfiling was not a breach. *See supra*, note 7.

was time-barred when he raised it, the Motion for Leave to Amend was properly denied.

The appeals court did not err when it refused to reverse the District Court's ruling because Murray's proposed amendment would have been futile, was time barred and would have prejudiced the Respondents. Accordingly, this Petition must be denied.

CONCLUSION

This is a case where the Union consistently interpreted the Contract as allowing it to preserve its rights simply by filing an Arbitration Demand. The fact that the Hospital wanted to expedite the process and believed that it had negotiated such a process, does not compel the conclusion that the Union acted improperly by not capitulating to the Hospital's interpretation of the admittedly ambiguous language. Murray has not provided this Court with any cases that have held that the Union has an obligation to concede all disputes with the employer immediately simply because the employer may take a stance contrary to the Union. In fact, the cases cited by Murray compel that just the opposite is true.

Here, the Union consistently followed a long-standing interpretation of the contract. The fact that the employer disagreed with the Union's interpretation does not render the Union's conduct wholly irrational. Because Murray provided no evidence of arbitrary conduct by his Union, his complaint was properly dismissed. Accordingly, the Hospital requests that this Court deny this Petition For Writ Of Certiorari.

Respectfully submitted,

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APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT FILED AUGUST 29, 1995

No. 94-1187

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

GREGORY MURRAY,

Plaintiff-Appellant,

v.

DETROIT RIVERVIEW HOSPITAL; DETROIT-MACOMB HOSPITAL CORP.; DETROIT RIVERVIEW HOSPITAL WORKERS LOCAL 2435, AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES(AFL-CIO), *a labor organization; and* MICHIGAN AFSCME COUNCIL 25 (AFL-CIO), *a labor organization,*

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN

NOT RECOMMENDED FOR FULL TEXT PUBLICATION. Sixth Circuit Rule 24 limits citation to specific situations. Please see Rule 24 before citing in a proceeding in a court in the Sixth Circuit. If cited, a copy must be served on other parties and the Court. This notice is to be prominently displayed if this decision is reproduced.

Appendix A

BEFORE: BROWN, KENNEDY and **NORRIS**, Circuit Judges.

ALAN E. NORRIS, Circuit Judge. Plaintiff Gregory Murray brought this hybrid suit against Detroit Riverview Hospital and the union that represented him, Detroit Riverview Hospital Workers Local 2435, after the hospital terminated his employment. The district court granted summary judgment in favor of defendants, and Murray appealed.

I.

The hospital fired Murray on April 1, 1991 for allegedly breaking a work rule. He contends that the firing was in retaliation for his activities as a steward of the union, which is a local affiliate of the American Federation of State, County and Municipal Employees (AFSCME) and Michigan AFSCME Council 25 (Council 25).

The 1988 through 1990 collective bargaining agreement (CBA) between the hospital and the union established a special procedure for the resolution of employee discharge grievances. Under that procedure, if the union was dissatisfied with the answer provided by the hospital at the fourth step of the grievance procedure, it was required to present an arbitration demand to the hospital within fourteen days of receipt of the hospital's answer. In the CBA provision at the center of this controversy, it continued, "Upon filing of a demand for arbitration, [the demand] shall be submitted to" the appropriate arbitrator.[1] In 1989, the hospital notified the union that, in

1. The CBA created a panel of five pre-selected arbitrators, rotating automatically. The arbitrator to whom notice was to be given was the one whose name was next in the rotation.

contrast to the union's interpretation, it read the CBA as requiring the union to notify the arbitrator simultaneously when filing a demand for arbitration with the hospital.

The union filed a grievance on Murray's behalf on April 5, 1991. The hospital denied the grievance at step four. The union timely presented a demand for arbitration to the hospital on May 1, 1991 but, in keeping with its interpretation of the disputed provision, did not notify the arbitrator. At some uncertain point, the union notified arbitrator Joseph Girolamo who, since he was not the next arbitrator in the rotation, was not the appropriate arbitrator to notify. The hospital, in accordance with its view of the disputed clause, treated the arbitration demand as untimely and refused to arbitrate the grievance. The union therefore filed unfair labor practice charges with the Michigan Employment Relations Commission (MERC).[2]

Since it was not the appropriate forum in which to lodge them, the MERC dismissed the charges for lack of jurisdiction. The union did not refile the charges with the National Labor Relations Board (NLRB), the body that has jurisdiction over such claims. Murray learned of the dismissal of the MERC charges on November 6, 1991 but did not file a charge against the union.

The hospital eventually agreed to arbitrate Murray's grievance in a bifurcated fashion. The arbitrator would first consider whether the grievance was arbitrable despite the union's failure to notify the arbitrator upon making its demand

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2. The unfair labor practice charges alleged that the hospital had unlawfully fired Murray and two other union members — Regina Shorter and Darlene Baker — because of their union affiliation and had violated the CBA by refusing to arbitrate their grievances.

for arbitration. If so, the arbitrator would proceed to consider the merits of the grievance. At the first stage, the union argued, as it does here, that the CBA's provision for notice to the arbitrator does not impose a duty on either party but instead gives both parties the right to notify the arbitrator in order to expedite the proceedings. The arbitrator rejected that argument and concluded that the CBA obligates the union to notify the arbitrator upon demanding arbitration. The arbitrator concluded that the union's failure rendered the grievance non-arbitrable and therefore dismissed it.

Murray sued the hospital and the union, claiming that the hospital had violated the CBA by firing him and that the union had violated its duty of fair representation by failing to notify the arbitrator of its intent to arbitrate his grievance. The parties agreed to hold discovery in abeyance and file cross-motions for summary judgment by December 13, 1993. The parties filed cross-motions for summary judgment on December 13, 1993. Murray, at the same time, moved for leave to file a second amended complaint. The district court granted the union's and the hospital's motions for summary judgment and denied Murray's motions. He now challenges the district court's rulings.

II.

We review the district court's grant of summary judgment *de novo*. *International Ass'n of Machinists and Aerospace Workers, Local 1770 v. Lourdes Hosp., Inc.*, 958 F.2d 154, 156-57 (6th Cir. 1992). Summary judgment is appropriate if the pleadings, affidavits, and fruits of discovery "show that there is no genuine dispute as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c).

Murray argues that the union breached its duty of fair representation by failing to satisfy the CBA's arbitrator notice requirement. To succeed, he must show that the union's conduct was "arbitrary, discriminatory, or in bad faith." *Vaca v. Sipes*, 386 U.S. 171, 190 (1967). "[A] union's actions are arbitrary only if, in light of the factual and legal landscape at the time of the union's actions, the union's behavior is so far outside a 'wide range of reasonableness,' as to be irrational." *Air Line Pilots Ass'n, Int'l v. O'Neill*, 499 U.S. 65, 67 (1991) (citation omitted); *see also United Steelworkers of America v. Rawson*, 495 U.S. 362, 372-73 (1990); *Black v. Ryder/P.I.E. Nationwide, Inc.*, 15 F.3d 573, 584 (6th Cir. 1994).

Murray cannot satisfy this heavy burden. The CBA's arbitrator notice provision is unclear. Whereas other provisions in the CBA impose specific duties on specific parties, the disputed provision does not. Rather, it states, "upon filing of a demand for arbitration, it shall be submitted to [the appropriate] arbitrator." Since the provision does not refer to the union or the hospital, the union's interpretation of it as not imposing a requirement on either party is one sensible construction.

Murray argues, however, that the union's past conduct indicates that it actually knew its reading of the CBA to be untenable. He points to the fact that prior to the Baker case, which arose around the same time as Murray's, the union withdrew arbitration demands each time the hospital objected to the union's failure to notify the arbitrator. It does not follow necessarily that the union's past conduct amounts to a tacit admission that the hospital's interpretation is correct. A variety of unknown factors might have motivated the union in those prior instances. Murray's argument in this regard is further weakened by the fact that the union zealously advocated its

interpretation of the CBA in this case and in the Baker and Shorter cases.

The union's interpretation of the CBA was one reasonable interpretation that happened to advance the union's strategic concerns. Especially since the union vigorously advocated that interpretation, its conduct cannot be called irrational.

Murray also argues that the union's assertion to the district court that it did in fact notify an arbitrator raises the question of whether the union violated its duty of fair representation by failing to present — in the arbitration to determine arbitrability — an available persuasive argument in favor of arbitrability. At arbitration, the union did not argue that it had in fact notified the arbitrator; instead, it argued that the CBA did not obligate it to do so.

While the failure to present an argument might in some cases be deemed irrational conduct, two factors preclude that conclusion in this case. First, in view of the conceded flaws in the purported notice — it was submitted to the wrong arbitrator and cannot be shown to have been submitted in a timely fashion — the arbitrator would have almost surely rejected an argument by the union that it actually provided notice. Moreover, arguing that it actually notified an arbitrator could be construed as an acknowledgment that the CBA required such notice. Such an acknowledgment would have weakened the union's strongest argument, *i.e.*, that the CBA did not require the union to notify the arbitrator. Under these facts, the union's failure to argue that it actually notified the arbitrator cannot be called irrational.

Because we conclude that the union's conduct in the prosecution of Murray's grievance fell well within a "wide range

of reasonableness," we reject Murray's contention that the union breached its duty of fair representation.

III.

Murray, in his second amended complaint, sought to assert that the union breached its duty of fair representation by intentionally allowing the statute of limitations to run before lodging an unfair labor practice charge with the NLRB. He challenges the district court's denial of his motion to amend his complaint to add this allegation.[3] We review the district court's denial of his motion for abuse of discretion. *Prather v. Dayton Power & Light Co.*, 918 F.2d 1255, 1259 (6th Cir. 1990), *cert. denied*, 501 U.S. 1250 (1991). While leave to amend is to be freely granted, Fed. R. Civ. P. 15(a), it is to be denied if the amendment would be futile, would result in undue delay or prejudice to the opposing party, or was brought in bad faith. *Foman v. Davis*, 371 U.S. 178, 182 (1962).

In his proposed second amended complaint, Murray alleged that the union acted in bad faith by intentionally concealing and failing to inform him of its negligent misfiling of the unfair labor practice charge with the MERC — rather than with the NLRB — even though the union learned of its misfiling while there was still time to remedy it. We are unable to say that the district court's denial of leave to assert this claim was an abuse of discretion, since allowing the proposed amendment would have prejudiced defendants and would have been futile. Murray filed

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3. While Murray's notice of appeal referred to only the district court's grant of summary judgment, this issue is properly before us because an appeal from a final judgment, such as the district court's grant of summary judgment, draws into question all prior non-final orders. *Caldwell v. Moore*, 968 F.2d 595, 598 (6th Cir. 1992).

his motion on the stipulated date for the submission of summary judgment motions. Granting Murray's last minute motion would have caused defendants to, in effect, start over after having prepared a summary judgment motion and its supporting documents. Since Murray failed to provide a persuasive justification for the delay, it follows that it was undue delay under the circumstances of this case, and that allowing the amendment would have resulted in undue prejudice to the defendants.

IV.

For the foregoing reasons, we affirm the district court's order granting defendants' motions for summary judgment and its order denying Murray's motion for leave to amend his complaint.

APPENDIX B — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT FILED OCTOBER 17, 1995

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 94-1187

GREGORY MURRAY,

Plaintiff-Appellant,

v.

DETROIT RIVERVIEW HOSPITAL, *et al*

Defendants-Appellees.

ORDER

BEFORE: BROWN, KENNEDY and NORRIS, Circuit Judges.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

Appendix B

ENTERED BY ORDER OF THE COURT
/s/ Leonard Green
LEONARD GREEN
Clerk

(3)

No. 95-1136

Supreme Court, U.S.
FILED
FEB 16 1996
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

GREGORY MURRAY,

Petitioner,

v.

DETROIT RIVERVIEW HOSPITAL, DETROIT-MACOMB HOSPITAL CORP., DETROIT RIVERVIEW HOSPITAL WORKERS LOCAL 2435, AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES (AFL-CIO), a labor organization, and MICHIGAN AFSCME COUNCIL 25 (AFL-CIO), a labor organization,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Did the district court and the court of appeals correctly hold that the Union breached no duty of fair representation where:

(a) The Union interpreted its collective bargaining agreement as not requiring two simultaneous notices of arbitration, to both the employer and the arbitrator;

(b) The collective bargaining agreement provided that "either party" could submit the notice to the arbitrator;

(c) The contract established no deadline for the submission of the notice to the arbitrator;

(d) The employer had always historically notified the arbitrator;

(e) The Union had rational reasons for not simultaneously notifying the arbitrator; and

(f) An arbitrator subsequently agreed that the Union was not contractually required to simultaneously provide notice to the arbitrator?

2. Whether this Court should abandon the duty of fair representation legal standard established in *Ford Motor Co. v. Huffman*, 345 U.S. 330 (1953), *Vaca v. Sipes*, 386 U.S. 171 (1967) and *Airline Pilots Ass'n, Int'l v. O'Neill*, 499 U.S. 65 (1991).

PARTIES TO THE PROCEEDINGS

Respondents would note that the complaint asserted no claim against Respondent Michigan AFSCME Council 25 (AFL-CIO) ("Council 25"). However, as argued below, the same undisputed facts and established law which supported the court of appeals' decision affirming summary judgment for Respondent Detroit Riverview Hospital Workers Local 2435, AFSCME, would also have supported summary judgment and its affirmance in favor of Council 25 had the same claim been pleaded against it.

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Rule 56(e) 7, 8
Rules of the United States Supreme Court
Rule 10 5

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

No. 95-1136

GREGORY MURRAY,

Petitioner,

v.

DETROIT RIVERVIEW HOSPITAL, DETROIT-MACOMB HOSPITAL CORP., DETROIT RIVERVIEW HOSPITAL WORKERS LOCAL 2435, AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES (AFL-CIO), a labor organization, and MICHIGAN AFSCME COUNCIL 25 (AFL-CIO), a labor organization,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF IN OPPOSITION

COUNTER-STATEMENT OF THE CASE

1. Nature Of The Case

Petitioner Gregory Murray ("Murray") asserted two employment-related claims in this case. First, as to Respondent Detroit Riverview Hospital and Detroit-Macomb Hospital Corporation ("Hospital") Murray alleged that the Hospital had violated its collective bargaining agreement when it discharged Murray from employment. Record ("R") 1. Second, as to Respondent Detroit Riverview Hospital Workers Local 2435, American Federation of State, County and Municipal Employees (AFL-CIO)

("Local 2435"), Muray claimed that Local 2435 had violated its duty of fair representation because, following its long standing and consistent contract interpretation, it did not simultaneously notify an arbitrator of its intent to arbitrate this grievance when it filed its notice with the Hospital. R 1.

Although Murray's First Amended Complaint did not assert any claim against Respondent Michigan AFSCME Council 25 ("Council 25"), the same undisputed facts and established law which supported summary judgment for Local 2435 would have also supported summary judgment for Council 25 had the same claim been pleaded against Council 25.[1]

2. The Facts Of The Case

Plaintiff Gregory Murray was employed by the Hospital until his April 1, 1991 discharge. R. 1, ¶ 6. Asserting that Murray had left its emergency room unattended, the Hospital discharged him on April 1, 1991 by telephone and telegram. R. 1; R. 14; R. 27.

On April 5, 1991 Local 2435 filed a grievance on behalf of Murray, seeking his reinstatement with back pay. R. 1, ¶ 10; R. 14; R. 27. On April 11, 1991 the Union and the Hospital discussed Murray's grievance at Step 4 of the contractual procedure. On April 19, 1991 the Employer rejected the grievance at Step 4. R. 14; R. 27. On May 1, 1991 Local 2435 appealed Murray's grievance to Step 5, timely notifying the Hospital of its intent to arbitrate this grievance and naming Arbitrator Joseph Girolamo. R. 1, ¶ 11; R. 14; R. 27.

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[1] Although the Petition argues two other fair representation claims, they were *not* pleaded in the complaint. One, related to the filing of an unfair labor practice charge, was, rather, the subject of Murray's motion for leave to file second amended complaint. That motion was denied. The other, related to evidence presented at Murray's arbitration, was neither claimed in a complaint nor the subject of a motion to amend.

Under its long-standing procedure, whenever Local 2435 notified the Employer of its intent to arbitrate, it also submitted the grievance to its affiliated organization, Council 25, for internal review and approval. (If Council 25 approved a grievance for arbitration, it assumed all arbitration costs.) Council 25 subsequently approved Murray's arbitration, informed the Hospital and notified Arbitrator Girolamo that he had been selected. On May 28, 1991 Arbitrator Girolamo offered available hearing dates in June, August and September, 1991. R. 14; R. 27.

Shortly thereafter, James Neblett, a Council 25 representative, received a June 11, 1991 letter from the Hospital on another grievance, that of Darlene Baker, which was also pending at the arbitration step. R. 27. The Hospital refused to arbitrate Baker's grievance on the ground that the Baker's step 5 arbitration appeal had not been simultaneously delivered to both an arbitrator and the Hospital. *Id.* R. 14; R. 27.

In the face of the Employer's refusal to arbitrate these grievances, AFSCME prepared an unfair labor practice charge that it intended to file with the National Labor Relations Board ("NLRB"). R. 10; JA at 328.[2] This charge was, however, inadvertently filed with the Michigan Employment Relations Commission ("MERC")—the NLRB's public sector counterpart in the State of Michigan. *Id.* Notwithstanding MERC's subsequent dismissal of the unfair labor practice charge, AFSCME did ultimately obtain the Hospital's agreement to arbitrate the three pending cases: Murray's grievance, Darlene Baker's grievance and a third grievance for an employee by the name of Regina Shorter. R. 14; R. 27. The parties

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[2] By stipulation, the parties agreed to use all discovery in *Baker v. Detroit Riverview Hospital*, 834 F.Supp. 216 (E.D. Mich. 1993), *aff'd*, Docket No. 94-2426 (6th Cir. 1995), including the Deposition of James Neblett, referenced here to the Joint Appendix ("JA") filed below.

agreed that the arbitrator in each of the three cases would decide the procedural issue raised by the Hospital, namely, whether AFSCME was contractually obligated to simultaneously notify both the Employer and the arbitrator at Step 5 of the procedure.

The first grievance to be decided was the grievance of Regina Shorter. On April 2, 1992 Arbitrator William Daniel *agreed with* AFSCME that the contract did *not* require simultaneous dual notification. R. 14; R. 27; JA 66. While Arbitrator Daniel found that it was the Union's responsibility to notify the arbitrator, he specifically ruled that the notification to the arbitrator need *not* be simultaneous with the notification to the employer. Arbitrator Paul Glendon issued his decision on the Baker grievance on April 18, 1992. R. 14; R. 27; JA 76. He took the opposite view and adopted the Hospital's "dual notice" contract interpretation. In the third decision in this series, on Murray's grievance, Arbitrator Elaine Frost elected on February 11, 1993 to follow the views of Arbitrator Glendon. R. 14; R. 27; JA 56. Unlike Arbitrator Daniel, Arbitrator Frost decided dual notification was necessary.

3. The Proceedings Below

Murray initially filed suit on August 11, 1993, with a First Amended Complaint following on August 16, 1993.

On October 8 and 15, 1993 Respondents asked that Murray voluntarily dismiss the complaint, particularly in light of the previous decision in the virtually identical matter of *Darlene Baker v. Detroit Riverview Hospital, et al., supra.* Murray declined, but proposed that the parties stay discovery and file cross motions for summary judgment. R. 10; R. 18. Respondents accepted Murray's proposal. The subsequent Order to Hold Discovery in Abeyance and for Filing of Cross Motions for Summary Judgment required that cross motions be filed on or before Monday, December 13, 1993. R. 10.

On Friday, December 10, 1993, the afternoon of the last business day before motions were due, Murray unsuccessfully sought the Respondents' concurrence in a second amended complaint. R. 18, p. 2. The parties filed their respective cross motions for summary judgment by the following business day, Monday, December 13, 1993. R. 11, 13, 14. Murray also served a Motion to File Second Amended Complaint. R. 15. The Order Granting Defendants' Motions to Dismiss and for Summary Judgment and Denying Plaintiff's Cross-Motion for Summary Judgment and the Order Denying Plaintiff's Motion to File Second Amended Complaint were both entered on January 31, 1994. R. 30, 31.

Murray filed his notice of appeal on February 14, 1994. R. 34. The United States Court of Appeals for the Sixth Circuit filed its decision affirming the district court on August 29, 1995. On or about September 11, 1995 Murray filed a Motion for Extension of Time to File Petition for Rehearing *En Banc*, which was granted. Murray then filed a Petition for Hearing and Suggestion for *En Banc* on or about September 14, 1995. The court of appeals filed its Order Denying Petition for Hearing *En Banc* on September 17, 1995. Murray filed this Petition on January 16, 1996.

REASONS FOR DENYING THE WRIT

I. MURRAY HAS DEMONSTRATED NO REASON TO GRANT THIS PETITION.

As spelled out in Rules of the United States Supreme Court, "a petition for a writ of certiorari will be granted only for compelling reasons". Rule 10. Murray has presented no compelling reasons as to why this petition should be granted.

Although cast in terms of an alleged "conflict" among the circuits, as discussed in greater detail below, Murray has demonstrated no such conflict. Rather, both the district court and the court of appeals followed the law of

Ford Motor Co. v. Huffman, 345 U.S. 330 (1953); *Vaca v. Sipes*, 386 U.S. 171 (1967) and *Airline Pilots Ass'n, Int'l v. O'Neill*, 499 U.S. 65 (1991).

Nor would there be any conceivable basis for granting certiorari because of any alleged "misapplication" of established law to the facts of this case. As also discussed below, the record amply supported the district court and the court of appeals' rulings. Rather, it is Petitioner who continues to rely upon allegations not of record and, in fact, contrary to the record. For example, the Petition characterizes this as a matter that arose out of Petitioner's "discharge from employment and the discharge of two other union stewards one month before his own discharge". Petition ("P") at 2. In fact, the complaint made no reference to the discharge of anyone else. R. 1. This reformulation of Petitioner's claim is revisionist and unsupported by the record.

Similarly, Petitioner repeatedly claims that the Union had withdrawn previous grievances from arbitration because of the Employer's procedural objections. However, as both the district court and the court of appeals correctly noted, Petitioner provided absolutely no evidentiary support for that proposition. It is Petitioner, not the courts below, who has engaged in speculation about other grievances.

Petitioner also misstates the record when he characterizes the collective bargaining agreement as containing "a contractual deadline" for the notification to the arbitrator. Petition at 15. In fact, it was undisputed below that while every other step of the grievance procedure was governed by an articulated specific deadline, *no* such deadline was recited with respect to the notification to the arbitrator.

Petitioner also mischaracterizes the record below when he claims that all three arbitrators rejected the Union's contract interpretation. P. 5. In fact, Arbitrator Daniel *agreed* that the contract did *not* establish any specific

deadline for notification to the arbitrator. Expressly rejecting the notion of simultaneous dual submissions, Arbitrator Daniel interpreted the contract as providing the Union with a "reasonable period of time within which" to notify the arbitrator. JA 74.

Petitioner apparently continues to hope that an accumulation of mischaracterizations of the record will win his case for him. They have not done so thus far and do not support this petition for writ of certiorari now.

II. BOTH THE DISTRICT COURT AND THE COURT OF APPEALS CORRECTLY FOUND THAT ON THE UNDISPUTED MATERIAL FACTS, AFSCME DID NOT BREACH ITS DUTY OF FAIR REPRESENTATION.

As noted above, Murray presented only one claim against the Union below. Murray asserted that Local 2435 "breached the duty of fair representation that it owed the Plaintiff by failing to provide the arbitrator with timely notice of its appeal to arbitration." R. 1, ¶ 32-34. In other words, Murray claimed that Local 2435 breached its duty by interpreting its contract as not requiring two simultaneous notices—one to the Hospital and the other to the arbitrator. (It had always been undisputed that the Local gave the Hospital a timely notice of intent to arbitrate.) On the undisputed material facts, the district court and court of appeals correctly found that AFSCME's contract interpretation was within its wide range of reasonableness.

A. Murray's "Historical" Allegations Were Unsupported In The Record.

Both courts below correctly rejected Murray's so-called "historical" allegations about prior grievances because they were entirely unsupported by the record. Rule 56(e) of the Federal Rules of Civil Procedures requires parties to present "such as facts as would be admissible in evidence" and that their affidavits "shall show affirmatively

that the affiant is competent to testify to the matters stated therein."

Completely disregarding the requirements of Rule 56(e), Murray made and continues to make sweeping statements about other grievances. Because none of these allegations was supported as required by Rule 56, they were and remained entitled to no consideration whatsoever.

B. The District Court and Court of Appeals Correctly Determined That The Union's Contract Interpretation Was Within Its Wide Range Of Discretion.

1. *The Contract Did Not Say That AFSCME Had To Submit Two Simultaneous Dual Notifications.*

As also noted by the courts below, an analysis of AFSCME's contract interpretation must start with the contract language itself. As all three of the arbitrators ultimately noted, the contract did not state that AFSCME had to notify the arbitrator of his or her selection. Rather, it said "either party" could. This stands in contrast to other contract clauses which expressly impose specific duties on specific parties.

For example, at step 1, the contract requires that "the employee and his immediate supervisor should discuss the grievance." The obligation is plain and the responsible individuals are identified. R. 11; JA 38. Similarly, at step 2 the contract says that the grievance "shall be placed in writing by the group steward and signed by the employee." JA 39. Again, the obligation and the responsible persons are indentified. The contract also requires that the written grievance "be presented by the employees" group steward to the employees' department head." *Id.* Again, both the obligation and the person are specified. At step 3 the contract requires that "written notice . . . be given by the chairperson to the grievance committee or his designee to the personnel director of the hospital." JA 40. Similarly, at step 4 the contract

specifies that "the chairperson of the grievance committee or his designee shall file" the grievance. *Id.*

In contrast, at step 5 the contract states that "*either party* may give notice to the other party of its intent o arbitrate such grievance." (Emphasis added.) JA 41. Even more significantly, after requiring that notice of intent to arbitrate "*shall be given* within 14 calendar days," the contract provides that "upon filing of a demand for arbitration, *it shall be submitted* to an arbitrator selected on a rotation basis from the jointly agreed upon list." *Id.* (Emphasis added.) The contract does not say that "the union must" submit the grievance to the arbitrator. It does not say that "the union shall." Rather, the contract says, "it shall be submitted."

Thus, AFSCME's contract analysis was rational because the contract did not state what the Hospital claimed. In contrast to all other grievance clauses, it did not state that the Union had sole responsibility for notifying the arbitrator. This gap in the Hospital's contract interpretation argument was explicitly noted by both Arbitrators Frost and Daniel. Arbitrator Elaine Frost said "Neither of the questions raised is answered by the express contract language." JA 56, p. 7. Arbitrator Daniel also noted that the contract did not say what the Hospital claimed. "Because the contract does not say that exactly, the arbitrator must consider all of the facts and circumstances to determine if [the Employer's view] . . . is a fair and reasonable interpretation of the contract." JA 66 at 7.

Given the fact that the contract did not say what the Hospital claimed, the courts below correctly held that AFSCME's contract interpretation and conduct were well within its range of discretion.

2. *AFSCME Correctly Believed That The Hospital Had An Economic Interest In Notifying The Arbitrator.*

AFSCME's contract interpretation was also rational because it fit the parties' circumstances. Once the Union gave notice of its intent to arbitrate, the Hospital not only had the right to notify the arbitrator ("either party") but, more important, it was in the Hospital's economic interest to notify the arbitrator. After all, the sooner the grievance was submitted to an arbitrator, the more quickly the arbitration award would issue. Under the terms of the contract "the arbitrator shall schedule and hold a hearing within 90 calendar days from the date the arbitrator was notified of the assignment and the arbitrator shall submit a decision within 30 calendar days following the hearing." JA 41. The more quickly a decision issued, the sooner the Hospital would know whether it had to reinstate an employee and the sooner it would be able to limit its back pay liability. From an economic view, it behooved the Employer to "flip the switch" and submit the case to the arbitrator as soon as it received the Union's arbitration notice. This analysis, as the courts below agreed, was rational.

3. *AFSCME Satisfied The Contract's Requirement That The Grievance Be Moved From One Step To The Next.*

AFSCME's analysis was also rational because the contract did not support the Hospital's argument that arbitration was forfeited if the arbitrator had not been simultaneously notified. The contract only provided for resolution if a grievance was not appealed from one step to the next: "If not moved from one step to the next by the local union, it shall be considered settled at the last answer by the hospital." JA 37.

Thus, under the express language of the contract, once AFSCME gave the Hospital notice of arbitration within the 14 days required by the contract, it had moved the grievance from step 4 to step 5. The contract, contrary

to the Hospital's claims, contained no similar "resolution" language in connection with notice to the arbitrator.

4. *The Contract Imposed No Time Limit For Notice To The Arbitrator.*

Moreover, AFSCME's contract interpretation was rational because the contract contained *no time limit for submission to the arbitrator.* As both Arbitrator Frost and Arbitrator Daniel noted, there was no separate contract provision specifying time limits for submission to the arbitrator. The only contractual time limit was established for giving notice of intent to arbitrate to the Hospital within 14 days. And, as Petitioner concedes, it is undisputed that AFSCME timely submitted this notice of intent to arbitrate to the Hospital.

5. *The Contract Language Was New.*

In addiion, AFSCME was interpreting new contract language. Although the Hospital and AFSCME had had some differences of opinion about the meaning of the collective bargaining agreement, the language had never been interpreted by any third party and had never been arbitrated prior to Murray's discharge. At the time AFSCME was processing Murray's grievance, there were no arbitral pronouncements about the contract's meaning. In interpreting the contract, AFSCME relied upon the actual contract language, AFSCME's intent in bargaining it, the parties' circumstances and the parties' past history.[3] It was then up to each side to form a judgment about its obligations. The courts below did not err in finding this

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[3] As both James Neblett and Ken Witherspoon testified at their depositions in the virtually identical *Baker v. Detroit Riverview Hospital* case, AFSCME had *never* undertaken responsibility for notifying the arbitrator of his selection. R. 10, Stipulation; Neblett Dep. p. 31; Witherspoon Dep. p. 17 (both from *Baker* record.) As James Neblett further noted in his affidavit, it was historically the Hospital who had identified arbitrators on the rotating selection list, who reserved facilities at the hospital for meetings and who scheduled the hearing and the rooms. R. 14; R. 27, ¶ 5, 11, 13.

approach to be within the wide range of reasonableness accorded to AFSCME.

6. *AFSCME's Intent And Strategies Supported Its Contract Interpretation.*

As also established below, AFSCME's bargaining intent and strategy supported its contract interpretation. It had been Local 2435's practice to automatically send the Hospital a notice of intent to arbitrate on all discharge cases, regardless of their merits. R. 14; JA 128, ¶ 5. In that way, the cases would be preserved for arbitration pending Council 25's review and assessment of them. The process then gave Council 25 some time to investigate the merits of the discharge case and to determine whether or not it should proceed to arbitration. *Id.*

While the Union acknowledged that discharge cases were subject to expedited arbitration, contractually that meant that a decision had to issue within 120 days of arbitrator notification. Because it was Council 25's desire to have sufficient time to investigate the merits of the case and because it was in the Hospital's interest to force a quick arbitration with limited back pay, it was logically up to the Hospital to get the case scheduled, thereby forcing Council 25's hand and limiting the Hospital's back pay exposure.

This was not, then, a situation where a union failed to check the language of the contract. Nor was it a situation where a union failed to notice what the contract said. Rather, in this instance, the Union knew precisely what the contract said and formed an opinion as to its meaning based on the contract language, history, its intent and logic.

The question below was not whether a court would have interpreted the contract language differently. The question was not whether the Hospital ultimately had the better contractual argument. Rather, the question is whether the Union's contract interpretation was outside the wide range of reasonableness accorded to unions under

the law of *Ford Motor Co. v. Huffman*, 345 U.S. 330 (1953), *Vaca v. Sipes*, 386 U.S. 171 (1967) and *Airline Pilots Ass'n, Int'l v. O'Neill*, 499 U.S. 65 (1991). On the undisputed facts, the district court and the court of appeals correctly found that the written contract language, the parties' history and the Union's intent and strategies amply supported Local 2435's contract interpretation. Its conduct was not a breach of the duty of fair representation.

III. THE COURT OF APPEALS CORRECTLY HELD THAT THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN DENYING MURRAY'S MOTION TO FILE A SECOND AMENDED COMPLAINT.

A. An Amendment Is Properly Denied Where It Would Have Been Futile.

1. *The Amendment Would Have Failed To State A Claim.*

Where a proposed amendment is legally deficient on its face, the court may properly deny the motion to amend. *Banque de Depots v. National Bank of Detroit*, 491 F.2d 753, 757 (6th Cir. 1974). Or, to put it another way, if an amended claim could not withstand a motion to dismiss, it need not be permitted. *Neighborhood Development Corp. v. Advisory Council and Historic Preservation Department HUD, City of Louisville*, 632 F.2d 21, 22 (6th Cir. 1980).

Murray's proposed amendment was properly denied because it would have been legally deficient and subject to immediate dismissal. As a matter of law, and, on the undisputed facts, Murray's argument concerning the filing of the unfair labor practice charge did not state a claim.

As previously discussed, the Hospital initially took the position that because Local 2435 had not provided an arbitrator with a dual simultaneous notice, the Hospital would refuse to arbitrate Murray's and two other grievances. In order to obtain arbitration of these grievances,

the Union prepared an unfair labor practice charge that it intended to file with the National Labor Relations Board. It was, however, inadvertently filed with the Michigan Employment Relations Commission. R. 10; JA 328. As Murray concedes, the Hospital nonetheless subsequently agreed to arbitrate all three grievances.

On these undisputed facts, the court correctly found that Murray's reformulated duty of fair representation count would not state a claim as a matter of law. The unfair labor practice charge was part of a strategy to compel the Hospital to arbitrate Murray's grievance. Once the Hospital agreed to arbitrate, there was no need for the charge. Murray's proposed amendment to assert that the alleged "misfiling" of the unfair labor practice charge constituted a breach of the duty of fair representation would have been deficient as a matter of law.

2. *The Claim Would, In Any Event, Have Been Entirely Time Barred.*

Murray alternatively sought to argue that AFSCME breached its duty because his opportunity to file his own unfair labor practice charge was lost. Murray claimed that he was deprived of this opportunity because AFSCME allegedly did not tell him of the dismissal of the charge until after his six months to go to the NLRB had expired on October 1, 1991. He claimed that AFSCME's alleged failure to advise him of the dismissal of the unfair labor practice charge prior to October 1, 1991 constituted a breach of the duty of fair representation.

Yet, Murray conceded below that on November 6, 1991 he learned that the unfair labor practice charge had been dismissed for lack of MERC jurisdiction. "I first heard that the unfair labor practice charges were dismissed for lack of jurisdiction from Ms. Darlene Baker, at a union meeting following the unexplained cancellation of the MERC hearing, on November 6, 1991". R. 13; JA 118,

Assuming arguendo that AFSCME's failure to file in the correct forum and its failure to so inform him prior to October 1, 1991 constituted a breach, then Murray's claim accrued on November 6, 1991 when he learned that the charge had been dismissed. As of November 6, 1991 Murray had six months in which to claim that AFSCME breached a duty of fair representation in connection with the unfair labor practice charge. *DelCostello v. International Brotherhood of Teamsters*, 462 U.S. 151 (1983).

The complaint here was not filed until August 11, 1993, almost two years after Murray's November 1, 1991 discovery that the unfair labor practice charge had been dismissed for lack of jurisdiction. The amended complaint would have been time barred and, therefore, futile. As the court of appeals held, the district court was well within its discretion in denying Murray's motion to add this claim.

B. The Court Of Appeals Also Correctly Held That The Motion For Leave Was Also Properly Denied Because Of Resulting Prejudice To AFSCME.

Rule 15(a) of the Federal Rules of Civil Procedure provides that, while leave to amend shall be freely given, it may only be granted "when justice so requires." Even apart from its failure to state a claim and apart from being time barred, justice militated against permitting this proposed amendment. As previously noted, it was at Murray's own request that the parties entered into a stipulation to file cross motions for summary judgment. Murray's untimely motion to amend would have substantially prejudiced AFSCME in this proceeding.

That prejudice would have arisen, in part, from the fact that AFSCME had filed its motion for summary judgment pursuant to Murray's proposal. If Murray had been allowed to reformulate his theories, AFSCME would have had to incur the additional work of preparing an-

other motion for summary judgment. Moreover, this work would be unnecessary because, as discussed, the claim which Murray sought to present would be subject to immediate dismissal as failing to state a claim and untimely. It would have been contrary to justice to have allowed this amendment in the circumstances of this case.

IV. EVERY OTHER CIRCUIT COURT WOULD HAVE REACHED THE SAME CONCLUSION ON THE RECORD IN THIS CASE. THERE IS NO CONFLICT IN THE CIRCUITS.

After reviewing the record below, the court of appeals correctly held that the contract language supported the Union's interpretation of its collective bargaining agreement. While the contract expressly imposed specific deadlines on each and every step of the grievance procedure (deadlines which this Union met at each and every step in this case), the contract expressed no such specific deadline with respect to the notification to the Arbitrator. Nor did it explicitly require the Union to provide that simultaneous notice. The language of the collective bargaining agreement supported the court of appeals' conclusion that the Union's interpretation of its contract was a "sensible construction".

The court also correctly found that Local 2435's conduct was supported not only by the actual contract language, but also by its strategic concerns. As the record indicated below, it was in the Employer's interest that arbitration be expedited to minimize back pay liability. It was Local 2435's rational and well grounded strategic view that once it gave the 14-day notice of intent to the Employer (which it did in this case), the Employer was on notice of Local 2435's intent to arbitrate and was entitled under the contract language ("either party") to notify an arbitrator and thereby satisfy its goal of minimizing its back pay exposure. In contrast, Local 2435 did not want to immediately send the notice because it wanted to provide Council 25 time to review and approve

the grievance. This strategic concern, particularly when coupled with the actual contract language, AFSCME's intent and the parties' past history, placed Local 2435's conduct well within the wide range of reasonableness accorded to unions under this Court's historic standard.

The Sixth Circuit's analysis of the record and its conclusions of law were consistent with *Ford Motor Co. v. Huffman*, 345 U.S. 330 (1953), *Vaca v. Sipes*, 386 U.S. 171 (1967), and *Airline Pilots Ass'n, Int'l v. O'Neill*, 499 U.S. 65 (1991). This Court has repeatedly held that a union will not be deemed to have breached its duty of fair representation where it acts within its "wide range of reasonableness." *Ford Motor Co. v. Huffman*, 345 U.S. 330 at 338 (1953). The Sixth Circuit applied this well established law to the undisputed material facts of this case and correctly held that no breach occurred.

Petitioner has not demonstrated that any circuit court would have held otherwise. While he claims that the Tenth Circuit has endorsed a different standard of law, the case he cites, *Aguinaga v. United Food and Commercial Workers International Union*, 993 F.2d 1463 (10th Cir. 1993), embraces this Court's rule as most recently expressed in *Airline Pilots Ass'n Int'l v. O'Neill, supra.* It looked to see whether the union's activity had been "irrational in light of the surrounding climate". *Aguinaga*, 993 F.2d at 1471.

Petitioner also references the Seventh Circuit "abandonment" of bad faith or invidiousness as an element of the duty of fair representation. This is not surprising and establishes no conflict in the circuits either. It has long been clear that arbitrariness in and of itself can constitute a breach of the duty. *Vaca v. Sipes, supra.*

Petitioner then goes on to cite a series of Sixth Circuit decisions which he believes to be "inconsistent". Petition at 10, note 9. However, not only does he fail to demonstrate inconsistentcy, but—more important—the cases are

all from the Sixth Circuit. That hardly constitutes a conflict among the circuits.

What this Petition really does is ask this Court to rewrite the law on the duty of fair representation. There is, however, no need for such revisitation of well established law. As recently as *Airline Pilots Ass'n Int'l v. O'Neill, supra*, this Court has reaffirmed that unions breach their duty where their actions are arbitrary, discriminatory, or undertaken with hostility or in bad faith. It has long since been well established that each of these elements, standing alone or in combination with one another, constitutes a breach of the duty of fair representation. Petitioner has presented no reason why this well established standard should be disturbed.

CONCLUSION AND RELIEF REQUESTED

For all the foregoing reasons, Respondents Detroit Riverview Hospital Workers Local 2435, American Federation of State, County and Municipal Employees (AFL-CIO) and Michigan AFSCME Council 25 (AFL-CIO) respectfully ask that this Petition for Writ of Certiorari be denied.

Respectfully submitted,

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Dated: February 16, 1996